
IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.

HOME LAND AND CATTLE COM-
PANY (A CORPORATION), and THE
NATIONAL BANK OF COMMERCE
(A CORPORATION),

Appellants,

vs.

CORNELIUS J. McNAMARA AND
THOMAS A. MARLOW, Copartners
Under the Firm Name and Style of
McNAMARA & MARLOW,

Appellees.

VOL. II.

(Pages 321 to 633, inclusive.)

Appeal from the Circuit Court of the United States
for the District of Montana.

Q. No one asked you to count, then?

A. No, sir.

Q. After McNamara and Marlow had picked out their five hundred head, the balance were turned into another corral?

A. Yes, sir.

Q. Did you count that bunch?

A. No, sir; I did not.

Q. Was there any dispute between these parties as to the five hundred head, as to the count, Marlow on one side and Sharp, Niedringhaus and Blackman on the other?

A. At the time the animals were running through and they counted there was some dispute.

Q. But finally they got into the corral what each side agreed was five hundred head?

A. I suppose so; I had heard McNamara and Marlow was to take five hundred head and I naturally thought there was five hundred head in the corral.

Q. What time of day was it the horses were turned out of the corral?

A. If they were put in at twelve o'clock, I should think when they were taken out it might have been three o'clock; it might have been later or earlier.

Q. And all of the horses except Caldwell's were taken back to the ranch?

A. They were taken back across the river and were turned loose.

Q. Caldwell's horses were part of these, were they?

A. Yes, sir.

Q. Were his among the five hundred Marlow said he would take?

A. Yes, sir; some might have been in both places; there could have been a few in the eighty, two or three, but I suppose the majority was in the picked bunch.

Q. How many horses did Caldwell cut out?

A. About one hundred.

Q. How long did it take him?

A. About one hour.

Q. Did you take the balance back?

A. I helped to take them back.

Q. Did you take them to the ranch?

A. We swam them across the river and that was the pasture.

Q. Don't you remember about what time of day it was when you got the horses down to the river?

A. I don't know exactly what time it was, but we got them back before sundown, before dark.

Q. After the five hundred head had been counted out and those that were not to be taken had been put into the little corral, how long had they been separated?

A. They were all turned together again.

Q. That was done at once? A. Yes, sir.

Q. Now, you say that when you came up this time Mr. Blackman asked you whether you thought there were any more cattle on the range it would pay to work?

A. He did not ask me that at the ranch.

Q. Where did he ask you that?

A. At the mouth of Crow Rock, and after I got back to the ranch, Niedringhaus asked me.

Q. It was Mr. Niedringhaus? A. Yes, sir.

Q. Where were your cattle then?

A. I did not have any at that time that Blackmon asked me; I had turned them over; when Niedringhaus asked me I had 320 head.

Q. Then the three hundred and twenty you drove in and turned over to Caldwell were collected after this conversation?

A. Yes, after that talk with Blackmon.

Q. You said it was after you had worked the range?

A. I had not worked the range then; I was just beginning on the range the second time.

Q. So this conversation did not occur on or about the 15th or 16th of October?

A. No; at that time Niedringhaus asked me what I thought about the cattle over on the range?

Q. What was the date of this conversation with Mr. Blackmon?

A. It might have been the day I turned the cattle over to Birch.

Q. What was that?

A. The 16th of September, I was on the range and might not have had the date right.

Q. You told Mr. McIntire you had a conversation with somebody at the ranch? A. Yes, sir.

Q. Who was this—Niedringhaus?

A. I don't think there was anybody there; I was only there a few minutes, but I think Niedringhaus, Blackmon and Caldwell must have been there.

Q. What makes you think Mr. Niedringhaus was there? A. I know he was there.

Q. Was he the man you had the talk with?

A. We were all talking.

Q. Who commenced the conversation?

A. I think Mr. Niedringhaus.

Q. What did he say?

A. He asked how many cattle were on the range, and I said I didn't think they could get five hundred head there. He seemed to think I ought to get fifteen hundred head there.

Q. Was there anything else said?

A. I believe that was all.

Q. Now, when Mr. Niedringhaus was saying this and you were giving this amount, where was Mr. Blackman?

A. In the room.

Q. Did he have anything to say?

A. I do not know that he did.

Q. Where was Caldwell?

A. Outside, I think.

Q. This conversation occurred in the office?

A. Not right in the office, in Blackman's room, in his part of the building.

Q. In Blackman's bedroom?

A. No, sir; in his sitting-room.

Q. You quit down there on the 15th of November?

A. Yes, sir.

Q. Were you discharged? A. Yes, sir.

Q. Where have you worked since that time?

A. I went to work for McNamara and Marlow.

Q. Did you go to work for them immediately?

A. No, sir; not immediately, but about the 15th of December, I think; I could tell exactly by asking Mr. Marlow.

Q. You have been working for McNamara and Marlow since? A. Yes, sir.

Q. Did you ever work for them before?

A. No, sir.

Redirect Examination.

(By Mr. McINTIRE.)

Q. Who was it jumped on the fence after the horses were turned into the corral and told you to take the horses back? A. Mr. Niedringhaus.

Q. When the count was going on was the number counted in your presence?

A. Yes, sir; McNamara, Blackman, and Sharp would all count ten and I would keep count of it.

Q. Did you hear the final number called?

A. Yes.

Q. That was 575 head?

A. Yes, sir; I heard them say that was the number.

Q. In your cross-examination you stated that you went over the N range more than once?

A. Yes, sir.

Q. How many times did you go over it?

A. Twice.

Q. How many cattle did you get the second time?

A. These I turned over to Dave Birch and then I only got three hundred and twenty head.

Q. Your entire part of it?

A. South of the Missouri River.

Q. That was your part of the range?

A. Yes, sir.

Q. Now, on the first gather in the same district how many cattle did you get?

A. Four thousand and some odd head.

Q. At this place?

A. That was my whole gather. I first turned over about a thousand head to Shuler and then again 1,662 turned over to Shuler; then I got 1,195 head and turned over to Birch; that was in the same country.

Q. That makes 3,857.

A. Yes, sir; and afterwards I turned over 320 head.

Q. In answer to a question on cross-examination you stated you knew the orders from what the boys told you?

A. Yes, sir.

Q. Were there any orders given to you?

A. Yes, sir.

Q. Who gave you orders? A. Loss Blackman.

Q. And you were to gather and ship everything?

A. Yes, sir.

Q. In your cross-examination you said Blackman did not tell you exactly about it as to how many were shipped; how is that?

A. I asked him how many head of cattle; he said less than 600 shipped in 1898.

Q. What were the orders as to the place of shipment of these animals? A. To what place?

Q. Yes. A. To Rosenbaum Brothers.

Q. In what city? A. Chicago.

Q. You said again in your cross-examination that the 79's had taken the west part of the N-N range?

A. Yes, they had taken their cattle and put them there.

Q. They took the range because no cattle were left there, did they not? A. Yes, sir.

Q. Who gave you the orders in the spring of 1897 to hold all animals and bring them to the shipping points?

A. I was not supposed to bring them to the shipping points.

Q. Well, the orders to hold the cattle?

A. Mr. Blackmon.

Q. After the horses were driven out of the corral you say Caldwell cut out a hundred? A. Yes, sir.

Q. Do you know what he cut them out for?

A. Yes, sir.

Q. Tell us.

A. To hold them cattle on; he could not hold them a foot.

Q. How many camps did the Home Land and Cattle Company have? A. They just had a horse camp.

Q. How far from the home ranch?

A. About forty miles.

Q. In 1896 and '97 how many did they have?

A. Only two that winter, but they worked more men.

Q. Where were they? A. Rock Creek.

Q. On the cattle range?

A. Blackmon used to live there; it was headquarters for the north side of the range.

Q. North of the river? A. Yes, sir.

Q. Did they have a horse camp on the Porcupine?

A. Yes, sir.

Q. But this camp in '97 and '98 was for supervising and looking after the horses? A. Yes, sir.

Q. Who were there?

A. Leavitt and me drawing pay.

Q. How many were in the employ of the company?

A. Three men.

Q. In '96 and '97 how many men were there?

A. Five or six men working that winter.

Q. Who was at the home ranch in '97 and '98?

A. Part of the time I was there and Glen Morrow, who is working there now.

Q. Was Blackmon on the ranch in '97 and '98?

A. Yes, sir.

Q. These four men were all that were there in '97 and '98?

A. Yes, sir; there might have been a few when they were cutting ice or something like that.

Q. You four occupied the position of foreman?

A. Yes, sir.

Recross-Examination.

(By Judge CULLEN.)

Q. You were not foreman, but wagon boss, were you not? A. Yes, sir.

Q. Now, when these horses were taken up there and put into corral, was the whole entire bunch counted?

A. I think they were.

Q. Do you know they were?

A. Five hundred head were counted.

Q. Was not that all that were counted?

A. No, they were all counted outside before they were put into the corral.

Q. Who counted them?

A. Blackmon and Niedringhaus.

Q. This time you speak of when Niedringhaus stood on one side and Marlow on the other, that was when the five hundred were counted?

A. Yes, sir. I don't think Niedringhaus and Marlow were the only men counting; there was others counting; anybody was liable to be counting. I think McNamara and Knoels were counting too; all had a hand in the counting of the horses.

Q. Knoels counting on the side of Marlow?

A. Yes, sir; he was working for Mr. Marlow.

Q. That was the time the five hundred were counted?

A. Yes, sir.

Q. At that time those that were separated and put into the other part of the corral were not counted?

A. Yes, sir; they were all counted.

Q. That was done by Niedringhaus?

A. Yes, sir.

Q. Marlow and Knoels counting on the outside?

A. I don't know.

Q. You did not count? A. No, sir.

Redirect Examination.

(By Mr. McINTIRE.)

Q. As a matter of fact the animals were all driven into the corral in a bunch, were they not?

A. Yes, sir.

Q. Did not Mr. Marlow pick out a certain animal and run it through the gate and cull them out? My understanding was that Mr. Marlow was to pick them out.

A. That was the way it looked to me he did it.

Q. Where was it Mr. Blackmon told you he had not figured, but that they had shipped less than six hundred head of cattle? A. In the old office.

Q. Can you tell when this conversation took place?

A. No, sir; but it was between the 7th and fifteenth of November, 1898.

Q. Who was present? A. No one at all.

MARTIN HAMBY.

Subscribed and sworn to before me this 27th day of January, 1899.

HENRY N. BLAKE,
Master in Chancery.

Wednesday Morning, January 25th, 1899.

THOMAS A. MARLOW, one of the complainants, being duly sworn, testified on behalf of complainants as follows:

Direct Examination.

(By Mr. H. G. McINTIRE, of Counsel for the Complainants.)

Q. 1. Mr. Marlow, give your full name?

A. Thomas A. Marlow.

Q. 2. You are one of the complainants in this action?

A. Yes, sir.

Q. 3. And a member of the firm of McNamara & Marlow?

A. Yes, sir.

Q. 4. Mr. Marlow, I wish you would state the circumstances of the making of the contract set out in the bill of complaint herein, in Chicago, in May, 1898?

By Mr. CULLEN, Counsel for the Defendants.—To that we object, as immaterial, and as not within any of the issues raised by the pleadings.

By Mr. McINTIRE.—It will appear in the bill of complaint, and that is put in issue, as I understand it, that one of the inducements for the defendants to make the

contract that they did make, was this guarantee of these nine thousand head of beef cattle.

Q. 5. This contract, Mr. Marlow, calls for nine thousand head of beef steers, of the ages of three years and upwards, and the spayed heifers of four years and upwards; what have you to say as to the including of that number of animals in the contract as it was made?

A. It was one of the most essential features on our part in making the purchase of the cattle.

Q. 6. Perhaps you had better say what was said between you and the representative of The Home Land and Cattle Company with regard to that feature of the contract?

By Mr. CULLEN.—To which we object, for the reason that the contract is plain; there is no ambiguity to it, and the testimony is irrelevant and immaterial.

(Objection sustained.)

By the MASTER.—I will reserve the ruling upon that question, and pass upon it when I come to make up my findings.

A. My partner and myself met Mr. W. F. Niedringhaus in Chicago, I think, one day before the making of that contract, and had a general discussion relative to the purchase of the cattle. We went there by request, and after discussing the number of cattle that they had, and the sort of a herd it was, and so on, we finally made them an offer of twenty-three dollars a head for the cattle, as they ran, without any reference to how many beef were

in them. They didn't accept that price when it was offered, and further talk with them brought out the proposition on our part to give them two dollars a head more—twenty-five dollars a head for the cattle—providing they would guarantee a certain number of steers of three years old and upward, and spayed heifers—in other words, beef cattle in the herd. They took that under advisement some time, between themselves, and finally wanted to know how much of a guarantee we wanted, and we asked for twelve thousand head. After some further talk we finally settled on nine thousand head as the number that was to be guaranteed in the herd, and the trade was made on that basis, at twenty-five dollars per head.

By Mr. CULLEN.—We move to strike out that testimony, as being incompetent, the contract being the best evidence.

(Sustained.)

By Mr. WALLACE.—Your Honor, we are trying to contradict or vary the contract in any way.

By the MASTER.—The ruling will be reserved.

Q. 7. I will ask you, Mr. Marlow, whether you and your partner, Mr. Marlow, would have given as much as twenty-five dollars per head, the contract price for all these animals, without this guarantee of beef animals to the extent of nine thousand head had it not been incorporated into the contract?

By Mr. CULLEN.—To which we object, for the reason that the contract is plain; there is no ambiguity to it, and

the contract is the best evidence; and upon the further ground that it is leading.

(Sustained.)

By the MASTER.—Ruling reserved.

A. No, sir; we would not have given it at that time.

Q. 8. What have you to say, Mr. Marlow, as to whether you and your partner would have entered into this contract or not, except for clause nine of the same?

A. My answer to that would be that we would not have paid twenty-five dollars a head for that herd of cattle without that guarantee of that number of beef cattle.

By the MASTER.—I overruled the objection made by Mr. Cullen, on the ground that the question just asked the witness was leading.

Q. 9. When you say “that guarantee,” you mean clause nine of the contract, do you not?

A. Yes, sir.

Q. 10. What, in your opinion, Mr. Marlow, would have been the value or selling price of that herd of cattle referred to in the contract without the guarantee contained in clause nine thereof?

By Mr. CULLEN.—To which we object, for the reasons already given, except as to the form of the question.

(Sustained.)

By the MASTER.—Ruling reserved.

A. My idea was that the offer of twenty-three dollars

per head that we made for the cattle without that guarantee was all that they were worth at the time.

Q. 11. That was your opinion?

A. That was our opinion, and that is all we were willing to pay.

Q. 12. Mr. Marlow, the deliveries began under this contract in 1897, did they not? A. Yes, sir.

Q. 13. Can you tell how many animals were delivered to you under the terms of the contract?

A. The total number—all told?

Q. 14. Yes, just the precise number.

A. The precise number which we received under the terms of that contract, including the strays which were shipped to Chicago, was 16,100 head.

Q. 15. Tell us what we are to understand in the cattle business, under the term "strays" as used by you in your answer to the last question, Mr. Marlow?

A. The term "strays" applies to beef cattle which were shipped to Chicago, and other eastern markets by other owners working on other ranges than The Home Land and Cattle Company's range, and for which sale money was sent back to the office of W. G. Preuitt, secretary of the association, and he in turn paid us for these direct.

Q. 16. These strays were never delivered to you direct? A. No, sir.

Q. 17. You received the money for these strays?

A. Yes, sir.

Q .18. In other words, you have given the defendant credit for it? A. Yes, sir.

Q. 19. Now, of these strays, what was the number Mr. Marlow?

A. 117 head of beef cattle, and thirty-one head of stock cattle, 148 head in all.

Q. 20. This delivery of cattle ran through the year 1897, did it, after making the contract?

A. Yes, sir.

Q. 21. Up to what time?

A. The last delivery that was made to us was on the 22d day of October, 1897, and the first on or about the first day of July.

Q. 22. Deliveries began, then, on or about July first, and continued down to October twenty-first and twenty-second, 1897; is that your answer? A. Yes, sir.

Q. 23. Had you any talks, or did you overhear any talks between any of the representatives of the defendant company, The Home Land and Cattle Company, with reference to the deliveries of October 21st and 22d, 1897?

A. With reference to the deliveries?

Q. 24. Yes, as to whether that delivery would be final—the final delivery or otherwise? A. Yes, I did.

Q. 25. With whom was such talks had, between what parties? Go ahead and qualify your answer.

A. I had some talks myself, and overheard some conversations.

Q. 26. Whom did you have any talks with, and about what time, Mr. Marlow?

A. To the best of my knowledge, about October first, when we had finished receiving the deliveries of cattle prior to this last one. I had a conversation myself with Mr. W. F. Niedringhaus, the president of the company at that time.

Q. 28. Now, go ahead and tell us what the Niedringhaus conversation was. There were two distinct talks, weren't there?

A. I am not able to state positively about that. I am inclined to think so. My recollection about that is that there were two conversations. I had a talk with Mr. Niedringhaus first and then with Mr. Blackman.

Q. 29. Tell us what the Niedringhaus talk was.

A. Personally, I had very little talk with Mr. Niedringhaus. After the cattle were received, we were all together there. My recollection is that Mr. McNamara was there, and I think Mr. Niedringhaus. On closer recollection, Mr. Blackman was there at the same time, and the question, I think, was asked by Mr. McNamara when they would be ready for their next delivery. He said they expected to be ready on or about the 14th of October, and my recollection is that Mr. McNamara asked the question if that would be their last cattle delivery—if they expected to make that their last delivery, and Mr. Niedringhaus' answer was that it was; that they expected to have all their cattle in and to be through at that time.

Q. 30. Is that all the Niedringhaus talk with regard to the final delivery of this stock?

A. I have no recollection of the entire talk; but I am positive that it was the substance of Mr. Niedringhaus' talk, that they expected to be through at that time.

Q. 31. You say you also had a talk with Mr. Blackman?

A. No, I don't believe I personally had any talk with Mr. Blackman.

Q. 32. Well, did you overhear any talk of Mr. Blackman with others?

A. My recollection is that I heard Mr. McNamara talk with Mr. Blackman about the same time, and the conversation was just to the same effect.

Q. 33. And when did you say these conversations were had—about when?

A. My recollection is that it must have been about the first day of October. I know it was after the delivery preceding this final one, and our books show that to have been on September 30th, and October 1st.

Q. 34. I will ask you to look at that letter. (Counsel for complainants hands witness paper.) In whose handwriting is that letter, or rather, the signature?

A. The signature is that of Mr. J. C. Van Blarcum, cashier of the National Bank of Commerce of St. Louis.

(The letter referred to is admitted in evidence, without objection on the part of defendants' counsel, and is marked Exhibit "B" by the master in chancery.)

Q. 35. I hand you now, Mr. Marlow, a telegram. (Counsel for complainant hands witness paper.) Who is

Albert W. Niedringhaus, whose name is signed to that telegram?

A. Well, he is one of the various members of the Niedringhaus family.

Q. 36. Did he have any connection with the turning over of these animals on October 21st and 22d, to you?

A. Yes, sir; he did.

Q. 37. In what capacity, do you know?

A. He was there acting under a power of attorney from the National Bank of Commerce of St. Louis.

(It is admitted by the parties that Albert W. Niedringhaus, at and prior to October 21st and 22d, 1897, was the duly appointed agent and attorney in fact of the National Bank of Commerce of St. Louis, one of the defendants in this cause.)

By Mr. McINTIRE.—We offer in evidence the telegram heretofore referred to. The same is admitted without objection, and is marked Exhibit “C,” by the master in chancery.

Q. 38. Now, if you will kindly tell us what was done in pursuance of, and after the receipt of the letter from Mr. Van Blarcum, and the telegram from Mr. Albert W. Niedringhaus.

(A copy of the letter referred to as being written by Mr. J. C. Van Blarcum is admitted in evidence without objection, and marked Exhibit by the master in chancery.)

A. Mr. McNamara and myself went down there on the 21st day of October, the day they stated in their tele-

gram and in their letter that they would be ready to turn the cattle over, to receive them. The first day—I think the train reached there about noon—and that afternoon they delivered one trainload of cattle to us, consisting of 626 head. That was all that could be counted out that afternoon; and Mr. McNamara, as usual, gave young Mr. Niedringhaus a memorandum receipt for that number of cattle. The next day, in the forenoon, they delivered over 307 head further to us, for which Mr. McNamara gave young Mr. Niedringhaus the usual receipt.

Question by Mr. CULLEN.—That is Albert Niedringhaus? A. Yes, sir. Albert W. Niedringhaus.

A. (Witness continuing.) That was all the cattle they delivered to us that day.

Q. 39. Now, these cattle that you have just mentioned, were delivered on what day to you?

A. 626 head on the 21st day of October—all beef cattle—and 307 head on the 22d day of October, of which 232 head were beef cattle.

Q. 40. Well, do you know whether there were any other beef cattle—three year old steers, or four year old spayed heifers, in the herd then held by the defendants at Oswego, for delivery?

A. No, sir; they told us they had taken the beef all out.

Q. 41. Who told you that? A. Mr. Blackman.

Q. 42. Who was Mr. Blackman?

A. Mr. Blackman was their range manager, or range foreman. He was in charge of all the work there, and the handling of these cattle.

Q. 43. Now, taking the beef steers that you received on October 21, 1897, and including all the beef steers received prior to that time in any of the deliveries, how many beef steers or spayed heifers of four year old and upwards did you gentlemen receive from the defendant?

A. Up to and including these two deliveries, 7,018 head, not including any strays.

Q. 44. How many strays had you received up to that time, October 21st or 22d, 1897?

A. We had received strays at that time, 113 head, of which 87 were beef.

Q. 45. Now, add these 113 head to the number you had received--

A. I want to qualify this evidence by saying, that while this entire stray list is entirely accurate, this statement may be one, two, or three out, or more than that; it may be short more than that.

Q. 46. Now, add to the number of steers and spayed heifers those you have just testified you had received, the proceeds or the number of steers that you had received up to October 21st, 1897.

A. I would say 7,105 head, and that includes the cattle received at that time.

Q. 47. And that deducted from the nine thousand head, would be how much? A. 1,895 head.

Q. 48. Now, what afterwards was done by you gentlemen on both sides at the deliveries of October 21st and 22d, 1897?

A. After the delivery of the 307 head on the 22d of October, for which Mr. A.W. Niedringhaus had taken Mr.

McNamara's receipt, Mr. A. W. Niedringhaus came to our tent, and asked Mr. McNamara for a draft in payment of these two lots of cattle—933 head. My recollection of the conversation after that was that Mr. McNamara said to Mr. Niedringhaus: "I will turn you over to Mr. Marlow; he usually does the figuring, and he will fix it up with you." He came into the tent, and I handed him a statement covering the value of the 933 head that had been delivered; I also allowed for 457 head of cattle still left in the herd, taking Mr. Blackman's count, and the number that he had given to Mr. McNamara. Allowing for 113 head of strays, and also 500 head of horses, which were to be delivered to us, making about \$45,575.00 which we admitted we owed him, and from that I took these 1,895 head of beef steers that were short, at \$20.00 a head, amounting to \$37,900.00, which left us in debt to them \$9,675.00, or about that sum, and that amount I tendered to Mr. Niedringhaus in full settlement.

Q. 49. You say you tendered; what do you mean by tendered?

A. I offered him National Bank notes, not National Bank notes, but legal tender notes, United States notes, which we took down from here for that purpose.

Q. 50. What did he say after you made this tender?

A. His answer was that he didn't know anything about the shortage proposition; that his instructions were to collect for the cattle that was delivered to us, and that he had no authority to make any settlement for any shortage that might be due us. I told him that this

was the only way we are prepared to settle, which was to pay the difference which we figured we owed them after all the deliveries were made.

Q. 51. Well, what was next done? Go on and tell it.

A. After that he went down to the store a few rods from our tent, and brought out a gentleman by the name of Sharp, who was there with him, and from that time forward Mr. Sharp took quite an active hand in the conversation all the way through.

Q. 52. Who was Sharp?

A. I asked Mr. Sharp, after I had had a few minutes' talk with him, if he was not an attorney at law, and he said he was not. I took him to be an attorney at law from St. Louis.

Q. 53. What conversation were had between you and Mr. Sharp in the presence of A. W. Niedringhaus, with Mr. Niedringhaus at that time?

A. Mr. Sharp came back to the tent, and my best recollection of the conversation now is that he was quite excited, and he said to me: "We know nothing about shortage money in any way, shape, or form. It is Mr. Niedringhaus' business to collect for these cattle that have been delivered to you people, and we expect you to pay for them. I said, "We certainly expect to pay for them, and that is what we are trying to agree upon, and I am making you this offer of what is due you." And I asked him the question, "If neither you or Mr. Niedringhaus know anything about this shortage, or who is to settle it, where are we to look for our money?" He said, "I don't know anything about that." I said: "You don't

even admit, then, that anything is due us." He said: "No, sir; we make no admissions that we owe you a cent." I also read this statement off to him, then, after this talk. Mr. McNamara was present and called in a couple of men who were working there, and I read the statement in their presence, and in their presence tendered Mr. Sharp this \$9,675.00—he and Mr. Niedringhaus together. We put the money on the table for them; I was on one side of the table, and they were on the other, and they again declined to accept. At the same time that I did this, both Mr. McNamara and I made a demand on both of them, in the presence of the same two witnesses who heard the conversation, that they immediately turn over to us the 457 head of cattle that were being held just back of the tent by their men. We wanted to pay them for them and demanded that they put them into the corral. We made the tender again on that proposition, and they refused again.

Q. 54. The same thing with regard to the horses?

A. Well, after some further talk regarding the matter, they sent off after the herd of horses, and they were put into the corral, and Mr. McNamara took out 500 head, according to this contract, and I and another man that was working for us tallied them, and when we got through, Mr. Sharp says: "Now, I demand pay for these horses in money," and we again made him a tender of the same amount of money in payment for those horses, accompanied by the same statement.

Q. 55. What did he do with reference to that tender?

A. He declined that sum and ordered the horses turned back, and took them home.

Q. 56. How many horses were turned back into the corral? A. About 585 head of horses.

Q. 57. You say he ordered the horses turned back; what do you mean by that, and who did the ordering?

A. Mr. Niedringhaus and Mr. Sharp were giving orders when it got to that stage of the transaction. That is my recollection about it. We paid no further attention to what they did with the horses after they declined to accept our money, and refused to deliver them to us.

Q. 58. What was done with the 457 head of cattle remaining undelivered?

A. These cattle were held there under herd by their men until Mr. McNamara and I went to Glasgow, a short distance from there, and commenced proceedings which resulted in the receivership, and on our returning there the receiver took charge of them.

Q. 59. Can you describe this 457 head of cattle?

A. Yes, sir; I can give you a complete list of them.

Q. 60. In this list of animals mentioned in paragraph nine of the bill of complaint, state whether or not there were any calves unbranded, running with their mothers.

A. I don't know which list of animals you mean in paragraph nine.

Q. 61. The list you have just handed me.

A. Yes, sir.

Q. 62. I will ask you this question, whether or not the

animals mentioned, the 457 head of cattle, are the subject matter of this suit? A. Yes, sir; they are.

By Mr. McINTIRE.—We will offer the list referred to by the witness in evidence, being the list of 457 head of cattle undelivered on the 21st and 22d days of October, 1897.

(The paper referred to is admitted without objection, and is marked Exhibit "D" by the master in chancery.)

Q. 63. Among these animals, how many calves were there, unbranded, running with their mothers?

A. 156 head; that is my recollection about it.

Q. 64. They were unbranded, as I understand it, and running with their mothers at that time?

A. Yes, sir.

Q. 65. Did I understand you to say that the receiver of the State court took possession of these animals?

A. Yes, sir.

Q. 66. What was afterwards done with them, if you know?

A. As soon as he got possession of them, he corraled them and loaded them and shipped them to Big Sandy.

Q. 67. What disposition did he make of the animals?

A. He sold the animals to us; we purchased them of him.

Q. 68. Mr. Marlow, what was the value in October, 1897, of beef steers, three years old and upwards, and spayed heifers of four years old and upwards—beef animals?

By Mr. CULLEN.—To which we object as irrelevant and immaterial, under the pleadings in this case, there being no issue as to the value of this class of stock.

(Overruled.)

By Mr. McINTIRE.—There is an allegation of fluctuations in value, and a positive denial on your part that there was not.

By the MASTER.—Judgment reserved.

A. I should say thirty-five dollars a head all around.

Q. 69. You have been in the cattle business some time, have you not, Mr. Marlow? A. Yes, sir.

Q. 70. Were you in the cattle business in 1897, prior to the transactions here mentioned? A. Yes, sir.

Q. 71. Had you bought and sold any cattle?

A. In 1897?

Q. 72. Yes, sir.

A. We didn't sell any cattle prior to the making of this contract.

Q. 73. Not prior to October, 1897?

A. You mean prior to October, 1897?

Q. 74. Yes, sir.

A. Yes, we had both bought and sold cattle in the year 1897.

Q. 75. I will ask you if, in the purchase of cattle, you followed the market quotations, as to the price of beef steers?

A. Well, I paid some considerable attention to it.

Q. 76. It is part of your business, isn't it, Mr. Marlow?

A. Yes, sir; it is our business to watch the market prices.

Q. 77. What is the market for cattle shipped from the neighborhood of Oswego, Mr. Marlow? A. Chicago.

Q. 78. Had there been any fluctuation in the price of animals in the year 1897, and if so, what?

A. Cattle were generally enhancing in value all through the year 1897.

Q. 79. Can you tell us how much they increased in value—approximately? We don't expect you to come within a quarter of a cent.

A. I should say from five to seven dollars a head.

Q. 80. Is this for beef or stock cattle?

A. Stock and beef cattle.

Q. 81. What have you to say as to their enhancing in value during the years 1897 and 1898?

A. They have increased in value since that time.

Q. 82. So that animals in 1898 were worth more than they were in 1897? A. Yes, sir.

Q. 83. How much more—can you tell, approximately?

A. Close to ten dollars a head.

Q. 84. You said that the fluctuation in the year 1897 was from five to seven dollars a head for stock animals; can you tell us how much of this enhanced value or increase in value was subsequent to the making of this contract, and prior to October 21st, 1897?

By Mr. CULLEN.—We object to the question, for the reason that it is incompetent, irrelevant, and immaterial, and not within the issues in this case.

(Overruled. Ruling reserved by the master in chancery.)

A. How much they had increased in value between the making of that contract—

Q. 85. And October 21st, 1897?

A. Well, the larger part of it, I should say, in my opinion.

Q. 86. Can you be a little more definite in your answer?

A. Well, I should say that cattle enhanced in value five dollars a head, during that time.

Q. 87. What is your business in northern Montana, Mr. Marlow? A. Cattle business and merchandise.

Q. 88. In the conduct of your cattle business, are you in the habit, or were you, of making contracts in the years 1897 and 1898 for the sale of animals for others?

A. Yes, sir; we were engaged in making contracts during recent years with the United States Government, the Interior Department.

Q. 89. For what purpose?

A. Both for stock and beef purposes.

Q. 90. Before coming down to that contract business, tell us what was the value of calves born in 1897 and in 1898—say, in the spring of 1898.

By Mr. CULLEN.—To which we object as immaterial, and not within the issues in this case.

(Overruled.)

By the MASTER IN CHANCERY.—Ruling reserved.

A. I should say that the calves of 1897, when they had been weaned, and properly taken care of, they were cheap at twenty dollars per head in the spring of 1898.

Q. 91. Then these 156 head in the undelivered herd of 457 head of cattle, were worth what?

A. They were worth twenty dollars and over.

Q. 92. That would be what? A. \$3,012.00.

Q. 93. Now, coming back to your Indian contracts, Mr. Marlow.

A. I wouldn't say twenty dollars; I would change that to nineteen dollars.

Q. 94. Change the total, then, of the 156 head of calves.

A. That would make the total value \$2,964.00.

Q. 95. Coming back to your answer to the former question concerning the Indian contracts for the year 1898; did you ever have any such contracts for the year 1898? A. Yes, sir; we did.

Q. 96. In order to supply or fill these contracts, what is it necessary for you and your partner to do, Mr. Marlow?

A. We have to look to it that we have sufficient cattle to do it with.

Q. 97. And when did you do this—looking ahead for that purpose, as a rule, Mr. Marlow?

A. We were making our purchases as we did in the early spring and in the winter for spring delivery.

Q. 98. Had the animals mentioned in this undelivered herd of 457 any value for the filling of such Indian contracts as you have testified to?

A. Yes, sir; a part of them did have.

Q. 99. What have you to say as to using the same, or

any of them, in the carrying out of the Indian contracts referred to?

By Mr. OULLEN.—The testimony with reference to the Indian contracts is objected to, for the reason that such contracts are in writing, and the writing is the best evidence.

Mr. McINTIRE.—Your Honor, in this, we are not going into what the contracts are; we only desire to show that there were such contracts. There is no right asserted under those contracts.

By the MASTER.—Ruling reserved. Overruled.

A. We used a very considerable number of those cattle—the 457 head of cattle, in filling our Indian contracts this last year, 1898.

Q. 100. Can you tell us that considerable number—do you know the number you used?

A. I can tell very closely, if you will hand me that list there, so that I can have it under my eye. We used about seventy-five dry cows out of that for beef; we sold 33 bulls, about all of them on a contract of that kind, and we used all of the one and two year old heifers that are specified here for the same purpose; and also all of the 156 calves that were heifers. There was probably about half, about seventy-five head of them heifer calves we sold the next spring as yearlings on an Indian contract.

Q. 101. What is the total of that 457 herd that you used? I think you have it totaled at the bottom of that page you have there in your hand, Mr. Marlow.

A. In round numbers, we used about 350 head of that stuff. I figure it 365; I will say 350 head on the various contracts that year.

Q. 102. When you say "that year," you mean the year 1898, do you? A. Yes, sir; the year 1898.

Q. 103. In the conduct of your business up there, had you made any arrangements in the year 1897 for the handling of any animals bought under the contract set out in the bill of complaint herein?

A. Yes, sir; we did.

Q. 104. Tell us what you did do in that regard.

A. We cut large quantities of hay.

By Mr. CULLEN.—I desire to make a motion to strike out all of the testimony of the witness with reference to the Indian contracts which he had in the year 1898, for the reason that the contracts themselves are not in evidence; and it does not appear by the testimony of this witness that the firm of McNamara & Marlow had any such contracts at the date of entering into the contract which forms the basis of this action, or that these cattle were bought with reference to the contract or contracts which they had in the year 1898.

By the MASTER IN CHANCERY.—The ruling will be reserved until after the argument, and when I come to find the facts.

(Overruled.)

Q. 105. Were any of these Indian contracts in existence in the year 1897?

A. Yes, sir; our contracts for beef always ran from June to June.

Q. 106. I will ask you whether or not the Indian contracts about which you have just testified about as being filled by animals out of the herd of 457 head referred to, were in existence at and prior to October, 1897?

A. Yes, sir; they were.

Q. 107. And how far back in 1897 were they in existence?

A. All of our Indian beef contracts ran from June 30th to June 30th; from one year to another.

Q. 108. This contract which is attached to the bill of complaint is dated May 27th, 1897; were the Indian contracts referred to in existence at that time, or in contemplation at that time?

By Mr. CULLEN.—To which we object, for the reason that what was in the contemplation of these complainants, and not communicated to the defendant, could not bind the defendants in any way, or serve to increase or lessen their liability.

By Mr. WALLACE.—The question is: What special value these cattle had to the plaintiffs?

By the MASTER IN CHANCERY.—There is one part of the question to which I am inclined to sustain the objection, and that is the part which refers to what the witness had in contemplation. I will reserve my ruling as to the other portion of the question.

(Objection to contracts in contemplation sustained. Overruled as to other ground.)

A. The beef contracts were in existence at that time.

We had other contracts for stock cattle in contemplation at that time, which, later on, we secured.

Q. 109. Later on, in 1897, you secured?

A. No, sir; not until April or May, 1898.

Q. 110. Now, with reference to these Indian contracts, what had the contract that you had made with the defendant in this case to do with it?

A. What had the contract of The Home Land and Cattle Company to do with it?

Q. 111. Yes?

A. In pursuance of our general policy right along, which we followed from year to year, we were providing ourselves with stuff, in purchasing these cattle, to fill these contracts with, along with other orders which we had with them.

Q. 112. Now, a minute ago, Mr. Marlow, you said something about being prepared to winter stock in northern Montana; whereabouts in Montana had you made such preparations? A. At Big Sandy, Montana.

Q. 113. What preparations had you made?

By Mr. CULLEN.—To which we object, for the reason that it does not appear that anything relating to the preparation for the wintering of stock was communicated to this defendant at the time of the making of this contract, or that such preparations had then been made.

(Overruled.)

A. We had a great many acres of land under fence up there; we had cut large quantities of hay and stacked it, and we had bought hay along with the use of the

ranches to feed it on, from other ranchmen in that neighborhood to winter this other stuff during the coming winter—the winter of 1897.

Q. 114. I will ask you whether such hay was used in connection with the 457 head referred to after you got them.

A. Yes, sir. Yes, sir, parts of it.

Q. 115. You have been some years in the cattle business, have you not, Mr. Marlow?

A. Yes, sir.

Q. 116. What have you to say as to your ability to purchase or procure animals from general sources in Montana, after the 21st and 22d of October in the year?

A. I should say that it wasn't possible to get them.

Q. 117. Why not?

A. Because it is too late to round them up, or to get hold of them or handle or ship them. It is too late, in other words, to get them off the range. It is not customary for anybody to sell or deliver them—range stock—after that time of the year.

Q. 118. Were those the conditions in 1897?

A. Yes, sir; applied to that year as much as to any other year.

Q. 119. Mr. Marlow, what efforts have been made by the parties to this contract to carry out the terms thereof subsequent to October 21st and 22d, 1897?

By Mr. CULLEN.—To which we object, for the reason that the pleadings and the testimony shows that the complainants broke the contract October 21st and 22d, 1897; and that there was no obligation on the part of the defendant to further perform the contract on its part.

By the MASTER IN CHANCERY.—I will reserve the ruling.

(Overruled.)

A. When you speak of the contract—the parties to the contract—you mean both parties, don't you?

Q. 120. Yes, sir; both parties.

A. We notified them on the 30th of May, 1898.

Q. 121. How did you notify them?

A. Notified them by letter.

Q. 122. By registered letter?

A. Yes, sir; I will say a letter, of which I produce a copy, notifying them that we were prepared to receive the remainder of the cattle, or such numbers as they could gather, under the terms of that contract for 1898, and that we expected them to gather the cattle according to the contract.

(The letter referred to by the witness is offered in evidence by complainants' counsel, admitted without objection, and marked Exhibit "E" by the master.)

Q. 123. Did you receive any answer to that letter?

A. After some time I did receive an answer to it.

Q. 124. Is that the answer? (Counsel hands witness paper.)

A. Yes, sir; this is the answer.

By Mr. WALLACE.—We will offer this letter in evidence.

(It is admitted without objection, and marked Exhibit "F" by the master in chancery.)

(Witness continuing.) I will further, in answer to that, say: That in that letter The Home Land and Cattle Com-

pany have made no effort whatever, or any offer, to carry out their part of that contract, for the season of 1898.

Cross-Examination.

(By Mr. W. E. CULLEN, Sr., of Counsel for the Defendants.)

Q. 1. The contract here in controversy was made in Chicago, was it not? A. Yes, sir.

Q. 2. How long had you been there prior to the time the contract was made?

A. I am not positive, Judge; either one day or two days. In all, stayed two days, I think, and only one day prior. I think we got through on the morning of the 26th.

Q. 3. Was Mr. Niedringhaus there when you arrived?

A. No, sir; I don't think he was; I think he got there a short time afterwards—the same day. That is my recollection.

Q. 4. Had there been any previous understanding or agreement as to meeting in Chicago for this purpose?

A. Yes, sir.

Q. 5. When did the negotiations for the purchase of these cattle first commence?

A. The first talk about that began between ourselves and one of the Niedringhauses at Miles City, during the Stockgrowers' meeting there in the spring; I think it was the 14th of April. That wasn't a negotiation, however; it went no further than his saying to us that he thought his people would like to sell these cattle. There was

some discussion as to how many they had. He was sick at the time.

Q. 6. You and Mr. McNamara were together in Chicago? A. Yes, sir; we went there together.

Q. 7. Was there anyone besides Mr. Niedringhaus representing The Home Land and Cattle Company present at the time this contract was made?

A. Yes, sir; Mr. Niedringhaus' son; George, his name is. It is on the contract as a witness, I think. It looks like George H. He is a son of W. F. Niedringhaus—George H. Niedringhaus. I don't know whether he was an officer of the company; he took an active part in the talk, just as much as his father did, relative to the cattle.

Q. 8. About how long after you arrived did the Niedringhauses arrive in Chicago, as far as you know?

A. I couldn't tell you. We met them at the office of Rosenbaum Brothers, at the Stockyards. We went to Rosenbaum's office the day we got there, and they probably got there the same morning. Our arrangement was to meet them in Rosenbaum's office. I don't know when they got there; that is when we first met them.

Q. 9. About what time of the day was it when you first met them at Rosenbaum's office?

A. I should think about ten or eleven o'clock in the forenoon.

Q. 10. How long was it after you first met them, before you reached an understanding, and had agreed upon the terms of your contract?

A. My recollection about it is that we met them there between ten and eleven o'clock in the forenoon. We had some preliminary talk, and then we all went to lunch together, and some time later that afternoon we agreed on a trade. I think, though, the contract wasn't written out until the next day.

Q. 11. Then your recollection is that an agreement was reached on the 26th of May, and the contract was written up on the 27th, is that correct, Mr. Marlow?

A. Yes, sir; that is my recollection of it now, as well as I can remember.

Q. 12. That is what you think about it, is it?

A. Yes, sir; I think it was written up the same day that we made the agreement, written up preliminary, and the next day we went up there and got them typewritten and signed.

Q. 13. By whom was that contract drawn?

A. We drew it ourselves. I sketched the contract out with a lead pencil, and submitted it to them, and they looked it over and altered a few little points in it, and I finally dictated it to a stenographer in an office there, and it was typewritten.

Q. 14. When was the first delivery of cattle made by the defendant under this contract?

A. The first of July, I think. On or about the first day of July; yes, sir.

Q. 15. How many cattle were then delivered?

A. 249 head that went to Fort Peck on an Indian beef contract. Shall I specify what was steers in that bunch?

Q. 16. Yes, sir.

A. 188 head of them were steers.

Q. 17. Well, I don't care so much about that. That is the total delivery made at that time? A. Yes, sir.

Q. 18. When was the next delivery of cattle made under this contract, Mr. Marlow?

A. On the eleventh day of July, 1897?

Q. 19. How many were then delivered?

A. 1,477 head of stock cattle shipped to Big Sandy.

Q. 20. When was the next delivery made under this contract?

A. The 20th day of July, 1,409 head of steers—of stock cattle, I should say, instead of steers.

Q. 21. Why were those cattle shipped to Big Sandy?

A. Everything but the beef in that herd we shipped home and turned them out on our own range to take care of them.

Q. 22. The home ranch of McNamara & Marlow is at Big Sandy? A. Yes, sir; at Big Sandy.

Q. 23. When was the next delivery?

A. The 29th of July, 679 head of stock cattle shipped to Big Sandy.

Q. 24. When the next delivery?

A. August 12th, 507 head of steers went to Chicago.

Q. 25. The next delivery?

A. The 14th of August, 483 head of steers.

Q. 26. Give the subsequent shipments up to October 21st, of what character, and where shipped.

A. The same date 476 head of steers, shipped to Chicago. The same date, 60 head of stock cattle to Chicago; August 15th, 528 head of steers to Chicago; August 15th,

490 head of steers to Chicago; August 15th, 37 head of stock cattle to Chicago; August 13th, 537 head of stock cattle to Big Sandy; August 13th, 281 head of steers to Big Sandy. August 18th to the 22d, 639 head of stock cattle to Big Sandy; 519 head of stock cattle to Big Sandy; 19th and 20th 1,434 steers and 1,212 head of stock cattle; September 2d, 507 steers to Chicago; September 3d, 203 head to the same place; September 3d, 304 head of stock cattle to the same place; September 4th, 308 steers to Chicago; 200 head of stock cattle to the same place; September 4th, 829 head of stock cattle to Big Sandy; September 30th, 521 steers to Chicago; October 1st, 343 head of stock cattle to Chicago; same date, 209 steers to Chicago; October 2d, 25 steers to Big Sandy; same date, 550 head of stock cattle to Big Sandy.

Wednesday afternoon, 2 o'clock.

Hearing resumed after recess.

Q. 27. How many cattle under this contract had been delivered and paid for prior to October 21st, 1897?

A. 15,019 head.

Q. 28. How were those divided, as to being stock cattle or otherwise?

A. 6,160 head of steers; the balance stock cattle.

Q. 29. How many strays had been received by you prior to that time, Mr. Marlow?

A. No payments were made on the strays until the end of the season. I allowed for these strays on the 22d of October, all that we had returns for at that time. I can give you that, if you wish it.

Q. 30. How many strays had you returns for prior to October 21?

A. Up to October 21st, 113 head. As I said before, in giving that testimony, it is possible I may have erred by two or three head; not to exceed that, though. 87 steers and 26 stock cattle, is what I reckon it at.

Q. 31. How many strays have you received on account since October 21st 1897?

A. Enough to make, all told, 148 head. All we have received. 117 steers and the rest stock cattle.

Q. 32. Were you present in person at all of these deliveries that were made prior to October 21st?

A. No, sir; I was not.

Q. 33. Were you present at any of them, and if so, what ones?

A. I was present at the deliveries of September 30th, October 1st, and October 2d, and October 21st and 22d.

Q. 34. Other than the deliveries which you have just mentioned, who represented The Home Land and Cattle Company in delivering these cattle?

A. Mr. McNamara, all of them. He was present at every delivery that was made.

Q. 35. How many cattle were delivered September 30th? A. September 30th, 521 head of steers.

Q. 36. How and to whom was payment made for that delivery, if you remember? A. September 30th?

Q. 37. Yes, sir.

A. Payment was made for all of these cattle at the National Bank of Commerce of St. Louis, Missouri, by draft or orders on Rosenbaum Brothers of Chicago.

Q. 38. To whom did you deliver that draft?

A. Of September 30th?

Q. 39. Yes, sir; who represented The Home Land and Cattle Company on this delivery of September 30th?

A. Who represented them?

Q. 40. Yes.

A. Mr. W. F. Niedringhaus, the president of the company, was there in person.

Q. 41. Now, on the other two deliveries that you have mentioned, when were you present—when you were present in September, who represented the company?

A. No one.

Q. 42. October, I should say.

A. October first and second? Mr. W. F. Niedringhaus, on both occasions—on all three of these deliveries.

Q. 43. How many cattle were delivered October second?

A. 575 head; 550 head of stock cattle, and 25 steers.

Q. 44. What was about an average trainload lot of cattle, Mr. Marlow?

A. Well, these all represent trainloads of cattle as they run along here. These figures that I have given in the neighborhood of 500 head, as low as 476 head, 483 head, 519, to as high as 639, according to the cattle.

Q. 45. And the number of cars?

A. That you happened to have on hand, and the kind of an engine you had to pull them.

Q. 46. No objection was ever made to any of these deliveries, on account of there not being a trainload of cattle; they were all received, were they?

A. Yes, sir; all received; there was no objection made, to my knowledge.

Q. 47. You have testified about the conversation that you had with Mr. Niedringhaus October first, 1897; where did that conversation occur? A. At Oswego.

Q. 48. Whereabouts at Oswego?

A. Around about the Indian traders' store at the corals, or up towards our tent, which was a few steps around away from there.

Q. 49. You are not able to state exactly where it did occur? A. No, sir.

Q. 50. Now, if you are not able to say, Mr. Marlow, where this conversation occurred, how are you able to state who was present at it, aside from Mr. Niedringhaus? A. How am I able to tell?

Q. 51. Yes, sir. A. Well, I remember that.

Q. 52. Who else was there?

A. Mr. Loss Blackman was there.

Q. 53. Was he present or within hearing?

A. We were all present during these talks.

Q. 54. Mr. Blackman was where he could hear this conversation that took place between you and Mr. Niedringhaus? A. My recollection is that he was; yes.

Q. 55. Which Niedringhaus was this that you had this conversation with? A. W. F. Niedringhaus.

Q. 56. Was there any other Niedringhaus there, except W. F. at that time?

A. The young man—as the boys call him, Ab.—was around, more or less, all the time. I wouldn't under-

take to say whether he was there when we were talking about this next delivery of cattle or not.

Q. 57. How did the conversation commence?

A. Commenced, as well as I can recollect, by Mr. McNamara asking Mr. Niedringhaus when they would be ready with their next delivery of cattle.

Q. 58. Didn't they have their next delivery of cattle right there? A. Certainly, they did not.

Q. 59. Where did the cattle come from that were delivered the next day?

A. There were no cattle delivered the next day, October third. I said in my testimony I was there when we were through receiving the cattle. I didn't specify to the date.

Q. 60. Do you know on which date it occurred?

A. I know as well as I know the date of any deliveries.

Q. 61. Then it must have been on the second day of October?

A. On the second day of October; a man cannot go back and spot onto these dates exactly; but that is my recollection of it.

Q. 62. What was Mr. Niedringhaus' reply?

A. That they expected to be ready with their next lot of cattle on the 14th.

Q. 63. Anybody else have anything to say about it, except Mr. McNamara, Mr. Niedringhaus and Mr. Sharp?

A. I don't remember whether Mr. Blackman had anything to say about it or not. Mr. Niedringhaus was the head man there.

Q. 64. And at that time Mr. Blackman didn't have anything to say about it?

A. I don't think he had anything to say about it at that time.

Q. 65. Did that end the conversation, or did Mr. McNamara make a reply?

A. I don't remember exactly as to that. I don't remember whether he said he expected it to be the last delivery or not. Mr. McNamara asked the question whether that would be the last delivery or not.

Q. 66. And what did Mr. Niedringhaus say?

A. Mr. Niedringhaus said, "Yes," they expected to get through this next delivery. He made a talk, I remember, on this delivery. He said, "Will you take all the steers on this delivery that we are ready to clean up, those that you have been throwing back for this last month or two?" And Mr. McNamara says, "Yes."

Q. 67. What steers were those?

A. There is a clause in that contract which says that we are not compelled to receive any of these beef cattle until such time as they were beef and fit to ship to Chicago. A number of these deliveries were made there with a good many thin cattle which were brought in, and that Mr. McNamara did not consider were fit for beef, and he threw them out, and he put them out, and turned them back. That is some that these boys had reference to yesterday.

Q. 68. About how many of these steers had been held in that way?

A. I couldn't say now. I didn't take such an interest in them as to know how many there were of them.

Q. 69. When did you reach Oswego, when you went down to receive these cattle?

A. On the 14th, the day they were to be given to us.

Q. 70. Did you remain there until the 21st?

A. No, sir; I should say we didn't; the train came back west that night.

Q. 71. Where did you go to then?

A. Came back to Big Sandy.

Q. 72. When did you reach Oswego, when you went down to receive the cattle on the 21st?

A. When did we reach there?

Q. 73. Yes, sir.

A. On the 21st. My recollection is the 21st.

Q. 74. Mr. McNamara was with you?

A. Yes, sir.

Q. 75. Who else—who was accompanying you?

A. Just ourselves.

Q. 76. Anyone else? A. No one, that I know of.

Q. 77. Didn't you have a foreman there?

A. We had a couple of men there in our employ all summer. They stayed there all the time.

Q. 78. Who made the delivery on the 21st, on behalf of The Home Land and Cattle Company, the defendant here?

A. What do you mean by who made the delivery?

Q. 79. Who was representing The Home Land and Cattle Company on that delivery?

A. That is a hard question to answer. I don't think anybody was representing them. Mr. Blackman might have been representing them. Mr. Niedringhaus was delivering cattle by authority of his power of attorney from the National Bank of Commerce of St. Louis. Mr. Blackman was assisting in that capacity, probably.

Q. 80. Mr. H. L. Niedringhaus was there?

A. Yes, he was around; if that is the man that is referred to. He took no hand in the delivery of the cattle, that I knew of, at any time.

Q. 81. When did you first see Mr. H. L. Niedringhaus?

A. On or about the 14th of October, or the first day when we went down to receive the cattle, or when we expected to receive them.

Q. 82. He was there then?

A. He got there on the train that reached there in the afternoon. He got off the train, and we had a few minutes talk with him before we got on again.

Q. 83. Now, on that day did Mr. A. L. Niedringhaus and Mr. H. L. Niedringhaus leave there together, a couple of hours after you got there?

A. No, sir; my recollection in the matter is that Mr. A. W. Niedringhaus came there, and met us there during the afternoon of the 14th. I don't know any Mr. A. L. Niedringhaus.

Q. 84. Did you see Mr. H. L. Niedringhaus on the 21st?

A. Yes, sir; I wouldn't be sure that I saw him that day.

Q. 85. What time was the delivery of the cattle commenced on that day, Mr. Marlow?

A. Along about the middle of the afternoon; about five o'clock, I should say.

Q. 86. Where were the cattle that were delivered when you got there?

A. They were out north of Oswego, the herd itself, about three or four miles from town.

Q. 87. There are cattle yards at Oswego?

A. Yes, sir.

Q. 88. The cattle that were to be delivered were driven into the cattle yard? A. Yes, sir.

Q. 89. And as they were delivered driven onto the cars? A. Yes, sir.

Q. 90. Now, was the 626 head that you got on that day in the cattle yard, when you arrived there, Mr. Marlow? A. No, sir.

Q. 91. They were out back of the tent, were they?

A. They were out in the herd.

Q. 92. They were driven in, then?

A. Yes, sir; brought in and put in the corral after we got there.

Q. 93. When were the steers or beef cattle cut out of this herd that was being held there—was that done on the 21st?

A. I couldn't say whether they had those cut out when we got there, or whether it was the day before we got there; but I believe they went out and got the steers after we got there.

Q. 94. How long did the delivery take? It commenced in the middle of the afternoon, and finished when?

A. Sometime about when it was getting dark; six, half-past six, or seven o'clock. Something like that.

Q. 95. Did you hear Mr. A. W. Niedringhaus say anything about payment for those cattle that day?

A. No, sir; I did not.

Q. 96. What did he say with reference to the delivery that evening, after it was concluded?

A. That I couldn't say.

Q. 97. Not after it was concluded?

A. I don't think he said a word he went out to the tent with Mr. McNamara, and he wrote a receipt and handed it to him, and there was nothing said about it.

Q. 98. Did you go to the tent with Mr. McNamara?

A. Yes, I believe I was in the tent when he handed it to him.

Q. 99. Did you hear any conversation between the two gentlemen at that time? A. Yes, sir.

Q. 100. What was it?

A. I heard Mr. A. W. Niedringhaus say: "We can fix this up in the morning, Mac, when you get these other cattle that are to be delivered."

Q. 101. Where was this bunch of cattle shipped to?

A. Big Sandy.

Q. 102. Had you had any conversation with Mr. Niedringhaus before that, as to where you were going to ship them to, after the delivery? A. I did not.

Q. 103. Well, did you have any talk, or was there any talk in your presence about that?

A. No, sir; none at all.

Q. 104. He knew, then, that these cattle were to be shipped to Big Sandy, didn't he?

A. No, sir; I don't think he did.

Q. 105. Nothing said about it?

A. There was not in my hearing, to my knowledge; nothing said about where the cattle were going to.

Q. 106. Now, on the following morning, about what time did the delivery commence?

A. Well, we got out there pretty early the next morning; as soon as the boys could get breakfast and get to work; quite early. That time of the year, I should say between five and six o'clock in the morning.

Q. 107. In the morning? A. Yes, sir.

Q. 108. Where were the cattle when you got out there?

A. The cattle were still out back of the tent, some four or five miles, where they had been holding them, out north.

Q. 109. How long did it take to get them driven back into the stockyards?

A. They were not driven to the stockyards that day.

Q. 110. Where were they delivered?

A. They were cut out of the herd, three hundred and seven head were cut out, and tallied as the boys cut them. We put our boys in charge of them and started them to Fort Peck on a beef contract that we had there.

Q. 111. You didn't put them on the cars at all?

A. No, sir; they were delivered right to the herder.

Q. 112. How far away from the other bunch of cattle, from the beef steers, if you noticed?

A. Which other bunch?

Q. 113. The bunch which you afterwards put into the hands of the herders?

A. We all went out that morning and helped to cut the steers and tally them.

Q. 114. So you cut steers right out of that herd?

A. Yes, sir.

Q. 115. After those beef steers were delivered, was anything said about payment for the deliveries that had theretofore been made, and if so what?

A. Mr. Niedringhaus came down to the tent just after these cattle had started for Fort Beck, and asked Mr. McNamara for a draft in payment for the cattle—the two lots.

Q. 116. You had gone down to the tent ahead of him, had you?

A. Yes, Mr. McNamara and I went back to the tent, and Mr. Ab. Niedringhaus came behind us.

Q. 117. The tent was four or five miles from where you had received the cattle, was it, Mr. Marlow?

A. Yes, sir.

Q. 118. What time was it when you got back to the tent?

A. Well, it was still early in the forenoon; might have been nine or ten o'clock.

Q. 119. When you were out there, was anything said

about driving in the balance of these cattle and delivering them? A. No, sir.

Q. 120. The beef steers was all you wanted on that 22d day of October, was it?

A. No, sir; we calculated to get the balance of the cattle out; we had expected to.

Q. 121. Mr. Niedringhaus found you and Mr. McNamara in the tent when he arrived there?

A. Yes, sir; around there.

Q. 122. What did Mr. McNamara say to him when he demanded pay for these deliveries?

A. My recollection of what he said to him was: "I will turn you over to Mr. Marlow; he does the figuring, and he will fix it up with you." Something to that effect.

Q. 123. Mr. McNamara remained there in the tent?

A. Yes, sir.

Q. 124. How did it happen, Mr. Marlow, that you had gone down there with this legal tender currency, ready to make this payment? A. how did it happen?

Q. 125. Yes.

A. We considered that we had had pretty good notice served on us that they were going to rob us. When we went there the 14th day of October, to receive the cattle (and they had agreed to gather them for us, and the cattle were all gathered there as they had agreed to) they declined to deliver them to us, without any reason for not doing so, or to give us any satisfaction as to when they would deliver them to us; and a few days after that we received a copy of this power of attorney from the

National Bank of Commerce of St. Louis to A. W. Niedringhaus, to deliver the cattle and receive the drafts; we thought we had ample notice that the company didn't intend to pay us for this shortage.

Q. 126. All of these payments had been made to the bank before that, had they? A. Yes, sir.

Q. 127. You knew that the National Bank of Commerce was the assignee of this contract?

A. Yes, sir.

Q. 128. Now, what was there in the mere fact that they had given Mr. A. W. Niedringhaus a power of attorney to excite your suspicion?

A. Mr. A. W. Niedringhaus had never acted as their attorney; the people had been out there themselves turning over the cattle, and I think Mr. W. F. Niedringhaus, the president of the company, had been out there himself at every delivery. I was only there twice myself.

Q. 129. Wasn't it three times?

A. Well, just twice. And the fact that they hadn't delivered these cattle on the 14th of October, and that they were through with the round-up and they declined to give us any reason why they wouldn't turn them over, I think we had every reason to be suspicious.

Q. 130. What reason was given for not delivering them on the 14th of October, Mr. Marlow?

A. None whatever; none at all.

Q. 131. Who did you have any conversation with on the 14th of October, about the cattle?

A. Mr. H. L. Niedringhaus.

Q. 132. Where did that conversation take place?

A. Right on the platform at the station at Oswego when the west-bound train pulled in. Mr. Niedringhaus got off of that train.

Q. 133. Well, what conversation did you have?

A. The conversation was about this: Mr. McNamara says to him, "Are you ready to turn these cattle over?" and he says, "No, we are not." Mac. said: "When will you be ready to turn them over?" and Mr. Niedringhaus says: "I don't know when we will be ready to turn them over." Mr. McNamara then says: "I understand you are through gathering"; and Mr. Niedringhaus said in response to that: "No, I cannot tell you anything about that." It is a flag station, and the train only stops there a few moments—the passenger train—just long enough for a person to step on or get off. Then Mr. McNamara says: "When will you deliver these cattle?" and he says, "I don't know; I will write to you, or come and see you in two or three days," and that is all that was said.

Q. 134. How long had you been at Oswego at the time this train got in there?

A. At the time the west-bound train got in?

Q. 135. Yes, sir.

A. I think we had lunch on the train that day; probably got there at half-past twelve or one o'clock. The other train came along about six or seven o'clock.

Q. 136. The train was late that day?

A. I don't remember about that. I think that is the time it arrived; I don't remember exactly.

Q. 137. Well, between the time you reached Oswego

and the time when you had this conversation with Mr. H. L. Niedringhaus, who had you seen representing this defendant there? A. I had seen Mr. Blackman.

Q. 138. Where did you see him?

A. Right there; right there around the store and the station.

Q. 139. Have any talk with him?

A. Mr. McNamara had talked with him; that I remember.

Q. 140. Whereabouts?

A. Oh, I cannot say right where. Perhaps in front of the store or in front of the tent, or at the station.

Q. 141. What was said?

A. Mac. said, "When are you going to be ready to turn over the cattle," and he says: "I don't know anything about when we are going to turn them over." I heard Mr. McNamara say to him: "Are you through rounding up," and he says: "Yes, we are through except around the bends of the river, and a few cattle that have broken away."

Q. 142. Was that all of that conversation?

A. That is all I recollect of it now.

Q. 143. Did you see anybody else there, representing The Home Land and Cattle Company, except Mr. Blackman from the time you arrived, to the time Mr. Niedringhaus came back?

A. Yes, saw Mr. A. W. Niedringhaus there that day.

Q. 144. Have any talk with him about it?

A. Nothing to amount to anything. He didn't have

any power of attorney then, and wasn't talking very much.

Q. 145. So then, in consequence of the refusal of Mr. Niedringhaus to deliver the cattle on the 14th of October, and the fact that the National Bank of Commerce had given Mr. A. W. Niedringhaus a power of attorney, you concluded it was best for you to go down there with this currency?

A. Yes, we thought we had better go down there with this currency.

Q. 145. Now, after Mr. McNamara turned Mr. Niedringhaus over to you, what took place between you?

A. Had a talk relative to the delivery of these cattle. The first thing that took place between us was, I sat down to the table and wrote out a statement, of which this is a copy. (Witness refers to paper), but which may not exactly jibe with the statement I gave him—that is, it may differ in some immaterial particulars. In other words, it is a copy of the statement that I gave him that day.

Q. 146. When was this statement that you have produced made out?

A. Made out right there. That one there, I just made that up yesterday. I got it out of this record book. (Witness refers to book in his possession.)

Q. 147. But it was a statement substantially like that?

A. Yes, except it might have had a few stray cattle, more or less, in it.

Q. 148. Did you count out the money to him that you agreed by your statement was due him?

A. No, sir; I put it in a bundle in front of him and asked him to count it; he refused to touch it, or to have anything to do with it.

Q. 149. You counted it out at the bank?

A. Yes, sir; I counted it when I took it away from here. I had a bundle of ten thousand dollars, and I counted it here and when I got down there; and when I got there I took three one hundred dollar bills out of it, which made it \$9,700.00.

Q. 150. Mr. Niedringhaus, as I understand you, went off and got Mr. Sharp?

A. Yes, sir; and he said he couldn't accept any such settlement as that; said he knew nothing about such a shortage, and went down about three hundred yards to the traders' store there, and came back with Mr. Sharp.

Q. 151. Was anything said between yourself and Mr. Niedringhaus with reference to the number of strays that had been delivered to you and paid for?

A. I don't remember any talk about the strays; they were there as stated in the statement.

Q. 152. They were stated in the statement?

A. Yes, sir.

Q. 153. Don't you remember that in that conversation with Mr. McNamara, Mr. Niedringhaus claimed that your statement didn't show the same number of stray cattle that they were entitled to credit for?

A. No, sir; I remember Mr. Sharp did: Mr. Niedringhaus didn't say anything about it.

Q. 154. Mr. Niedringhaus said nothing like that?

A. No, sir, Mr. Sharp did.

Q. 155. How long afterwards did Mr. Sharp make an appearance?

A. Right after this, as soon as A. W. Niedringhaus could go down to the store and back again.

Q. 156. Mr. Sharp came back with Mr. Niedringhaus?

A. Yes, sir.

Q. 157. Mr. Ab. came with him?

A. Yes, sir; I think he did—I said he came up; I am positive.

Q. 158. Where was your cook and herder at this time, that you had called to witness this transaction?

A. Right around there in the tent. The cook was working there about the tent.

Q. 159. Well, when Mr. Sharp came up, what took place between you?

A. About the same talk that took place with Mr. Niedringhaus, that they couldn't recognize any such settlement as that. Mr. Niedringhaus was there with a power of attorney to collect the money for these cattle, he said, and wouldn't accept any proposition of that kind; expected us to pay him in full.

Q. 160. In full for the cattle as delivered?

A. As delivered, yes. The cattle had been delivered the day before and that morning receipts accepted, and they said they expected we would give them a draft for the cattle, and they expected that kind of a settlement.

Q. 161. And you declined to pay?

A. I declined to pay, except that tender that I put before him, the moment he came into the tent.

Q. 162. That is, before Mr. Sharp?

A. Yes, sir; as soon as he came in there.

Q. 163. What further was said about this matter that you recall, Mr. Marlow?

A. That was all that was said about it.

Q. 164. Did he say anything about your having broken your contract?

A. Yes, after we got through, he served formal notice on us to the effect that we had broken our contract. Then I called the boys' attention to the fact, and I made the tender of the money, counted it out there on the table, and Mr. Sharp, I remember very well, lost his temper, and swept the money across the table with the back of his hand.

Q. 165. Didn't want it.

A. No, didn't want it; and then I made a demand on him that he bring in that 457 head of cattle and put them in the corral, and turn them over to us, which he declined to do. I asked him about the shortage, and he said: "We know nothing about this shortage matter; that is a matter to be adjusted somewhere else, or some other time. We expect payment for the cattle." I said, "If you don't know anything about it, who do we look to? You represent these people." He says: "We don't represent them in any such business as this," or words to that effect. I says: "You admit that you represent them for the purpose of getting the money and taking receipts for them." And he says: "I don't deny or admit any-

thing with reference to it. I am here to get this money for the cattle." There was a great deal more said, but that was the sum and substance of it.

Q. 166. What time of the day was it that this took place?

A. Well, I should say about noon. It was right after we got these Fort Peck cattle started off.

Q. 167. And you don't know how long it took to cut these cattle out and get them started?

A. Oh, some time.

Q. 168. Now, at that time where were the horses, at the time this conversation was going on?

A. The horses were all over the river, except those that Caldwell was using to hold this bunch of cattle.

Q. 169. What time of the day was it when these horses were driven in?

A. I think two or three hours after this talk; a couple of hours, maybe, after lunch.

Q. 170. Where were the horses put when they were driven in? A. In the stockyards.

Q. 171. Did you count the horses that were driven in?

A. When the horses were put in?

Q. 172. Yes. A. I did not; no, sir.

Q. 173. Did you count the entire band at any time?

A. No, sir; I did not.

Q. 174. How are you able then to testify that there were 580 head of horses?

A. I have not testified that there were 580 head; I testified there was about that.

Q. 175. How did you ascertain that?

A. I ascertained it in this way: While Mr. McNamara was taking our horses out, they were running them from one division to the other, and Mr. McNamara was turning out what we didn't want, and Mr. Knoell and I were tallying the horses that we wanted until we had tallied five hundred head. After we got through there was a little bunch left, and Herman Knoell got on top of the fence and counted them, and I saw Ab. counting them too, and we all made about the same 80, 81, 82, or a little over.

Q. 176. They didn't pass through a gate or anything?

A. Not the 81 odd head; the others did. I counted them myself.

Q. 177. Well, were there 81 or 85 head?

A. Well, from 81 to 85.

Q. 178. Was there a hundred head?

A. No, sir.

Q. 179. You are certain of that?

A. I am as certain of that, as I am that I counted the 500 head, myself.

Q. 180. Now, what time of the day was it when you got through counting these horses?

A. It was along in the afternoon, if I remember right; two o'clock, I guess; three, maybe.

Q. 181. How far is it from Oswego to Glasgow?

A. About twenty-eight or thirty miles.

Q. 182. What time was it when you started to Glasgow?

A. Started up there about the middle of the afternoon.

Q. 183. Well, you were counting these horses in the middle of the afternoon?

A. Yes, sir; we started as soon as we got through counting the horses.

Q. 184. You had gone down there with papers prepared, had you not, for a lawsuit?

A. No, sir; we had not.

Q. 185. Had you your attorneys with you there?

A. Had an attorney at Glasgow, yes, sir.

Q. 186. Well, the papers were all drawn up when you got to Glasgow?

A. No, sir; I think not; I never saw any.

Q. 187. Didn't see any? A. No, sir.

Q. 188. How long did you remain in Glasgow?

A. When we went back?

Q. 189. Yes. when you went this time and commenced this suit?

A. Maybe an hour and a half or such a matter; possibly two hours, or not over an hour. I don't remember now.

Q. 190. In the meantime you got out the papers for this suit?

A. The papers were all ready when we got there.

Q. 191. You filed them and had them served that same day, did you not, Mr. Marlow? A. Yes, sir.

Q. 192. Now, your attorneys had gone down to Glasgow for this purpose, had they not?

A. Our attorney had gone down there to protect our interest; he had no papers when he left here. Went to do whatever seemed best for our interests.

Q. 193. Well, when were the cattle put into the hands of Mr. Knoell, as receiver?

A. The papers were served—we got back there after dark that night.

Q. 194. The papers were served that night, were they?

A. I am not positive whether they were served that night or in the morning. The cattle were turned over to Mr. Knoell, if I remember right, quite early the next morning.

Q. 195. What did he do with them?

A. Brought them into the stockyards at Oswego.

Q. 196. On the 23d? A. Yes, sir; on the 23d.

Q. 197. And shipped them immediately to Big Sandy?

A. Yes, sir; he did.

Q. 198. How long after that had they sold them to McNamara and Marlow?

A. Sold them to us right there.

Q. 199. On the 23d of October?

A. We made a bargain with him for the cattle, and told him what we would give him for them.

Q. 200. So when they reached Big Sandy they were the property of McNamara and Marlow, were they?

A. They were, yes, sir.

Q. 201. What did you give to Mr. Knoell?

A. Twenty-five dollars a head.

Q. 202. The same as you had agreed to pay The Home Land and Cattle Company for them? A. Yes, sir.

Q. 203. Now, I believe you say the market for cattle

around in the vicinity of Glasgow and Oswego, and so forth, is Chicago?

A. Yes, sir; practically all the cattle go to Chicago.

Q. 204. The Chicago market really fixes the value of cattle? A. Yes, sir; I suppose it does.

Q. 205. Well, does it?

A. Yes, fixes the price for beef cattle.

Q. 206. What was the market value in Chicago of beef cattle on the 21st and 22d of October, 1897?

A. For these beef cattle?

Q. 207. No, for beef cattle?

A. Out of that herd?

Q. 208. Well, out of any herd; what would they be quoted at in Chicago?

A. Steers and spayed heifers out of that herd were worth from thirty-eight to forty dollars a head; somewhere in that neighborhood.

Q. 209. How long prior to that time had you shipped a trainload of these cattle to Chicago?

A. Prior to the 21st of October?

Q. 210. Yes, sir; you didn't ship any of these cattle that you got on the 21st?

A. We shipped cattle out of that herd to Chicago on the 30th of September, and the first of October.

Q. 211. What did you get for them?

A. Along about that price. I wouldn't be positive about that. I can go to my office and bring you the exact figures of what we got for them, in dollars and cents.

Q. 212. Do you remember what you got for any of

the shipments that you made out of that herd in Chicago?
A. Absolutely?

Q. 213. Absolutely.

A. No, sir; that is too big a job; I don't pretend to know. That is too many cattle.

Q. 214. Well, can you state about what you got for any of these shipments?

A. Well, I would rather bring an account of sales that I have got, and tell you exactly.

Q. 215. How long have you been shipping beef to Chicago, Mr. Marlow?

A. About nine years. I have been interested in cattle, and shipping to Chicago about that length of time. I think I first got interested in the cattle business in 1889.

Q. 216. During the season of 1897, about how many shipments did you make to Chicago?

A. About how many?

Q. 217. Yes, in round numbers.

A. I couldn't tell you. I had never been at Big Sandy to stay there all the time until about the tenth of September, 1897, when I left the Montana National Bank. Mr. McNamara made the shipments, and I couldn't tell; the books will tell, but I cannot tell from recollection.

Q. 218. But after September, 1897, you went to Big Sandy and made that your headquarters?

A. Yes, sir; I have been there most of the time.

Q. 219. Do you recall what was about the average price of beef in Chicago, during the month of September, 1897?

A. By the hundred pounds?

Q. 220. Any way.

A. No, sir, I cannot. I would rather give you the exact figures.

Q. 221. Now, after October 21st, when did you make the next shipment of cattle?

A. Didn't make any more out of that herd.

Q. 222. Well, any herd?

A. Well, made some more from Big Sandy.

Q. 223. You don't know what you got for that year?

A. No, sir.

Q. 224. When did you make the first shipment this year? A. This past season?

Q. 225. Yes, sir, 1898?

A. I think we commenced shipping cattle in August.

Q. 226. What was the price of beef cattle in Chicago in August, 1898?

A. I couldn't testify about that without getting the returns which I have up here at my office.

Q. 227. Well, how do you get the value of these beef cattle at thirty-five dollars a head all around in the month of October, 1897, if you cannot remember what the quotations were in Chicago, during the month of October, or prior to it?

A. I get it from the returns. I have a general recollection of what cattle would bring by the hundred pounds.

Q. 228. Did you make any other purchases of cattle in 1897, except this one herd that we have been talking about? A. Yes, sir.

Q. 229. From whom did you purchase?

A. We bought a herd of cattle from David Auchard, that lives at Fulton in this county, and another from Clifford Martin, and the Martin estate at Fort Benton, and some from Jack Harris down at Fort Benton, and some other small bunches that didn't amount to much. Yes, we also bought some from Mrs. Nichols.

Q. 230. When did you buy the Nichols cattle?

A. Oh, I couldn't say exactly; along in the spring.

Q. 231. Prior to the time you made this purchase?

A. Yes; I think we bought them before we bought these.

Q. 232. What did you pay a head for those cattle?

A. David Auchard cattle, \$25.00; for the Nichols cattle, \$24.00 a head, and Martin's cattle, \$22.50.

Q. 233. When was the Martin purchase made?

A. Along in the spring some time.

Q. 234. Were all of these purchases made before you bought these cattle of The Home Land and Cattle Company? A. Yes, I think they were.

Q. 235. The Harris cattle, when did you buy them?

A. Along about the same time.

Q. 236. What did you pay him?

A. About the same price.

Q. 237. Did you buy any in the fall of that year, if you remember?

A. The fall of 1897? No, sir; it isn't customary to buy stock cattle in the fall of the year.

Q. 238. How late in 1897 did you buy any cattle? You said you bought several other small bunches—how late in the season?

A. I think The Home Land and Cattle Company cattle were the last cattle, as well as I can recollect.

Q. 239. How many cattle, all told, did you buy in 1897 for McNamara and Marlow?

A. I will have to figure up.

Q. 240. Can you give it accurately?

A. My memory isn't good on these things. We bought about 1,100 head from David Auchard; 1,100 head from Mrs. Nichols, and about 400 head from the Martin estate, and also 150 head Clifford Martin, and from the Harris estate about 175 head. And there was some other little bunches that I don't remember about; about three thousand head outside of The Home Land and Cattle Company purchase.

Q. 241. Did you buy any cattle in 1898?

A. Did we buy any cattle in 1898?

Q. 242. Yes, sir.

A. Yes, sir, we bought some in 1898.

Q. 243. How many did you buy in 1898?

A. I think either 1,750 or 1,850 head; I don't remember which.

Q. 244. Of whom did you buy them?

A. Bought them of a man by the name of A. C. Quaintance.

Q. 245. What class of cattle were those?

A. Young cattle, all of them; there were no beef in them.

Q. 246. No beef cattle in them?

A. No about a thousand calves, yearlings and two year heifers and steers.

Q. 247. When did you buy these cattle?

A. They were delivered to us about the latter part of April; we bought them in December, 1897.

Q. 248. Those were bought in December?

A. Contracted for in December; I think it was in December we made the contract for them.

Q. 249. What did you pay for them?

A. \$26.50 on the cars at Boulder.

Q. 250. Now, you didn't buy any more in 1897 except these?

A. No, if we did, I have forgotten about them. We made a contract for some cattle this year with Judge Gaddis.

Q. 251. What class of cattle were those?

A. Stock cattle.

Q. 252. Is there any difference in the value of stock cattle, as to the breed of them, whether they are Herefords or Shorthorns or any other fancy stock?

A. Yes, sir.

Q. 253. What did you buy of Judge Gaddis?

A. Native cattle; a good bunch of native cattle

Q. 254. Did you buy any of his white-faced cattle?

A. White-faced cattle? No, if you mean Herefords we did not buy any of his thoroughbred cattle.

Q. 255. How much hay did you buy during the winter of 1897 and 1898?

A. Don't buy hay in the winter time; buy it in the summer time.

Q. 256. How much did you buy in the summer of 1897?

A. I couldn't tell you how many tons; quite a considerable quantity.

Q. 257. How much meadow lands have you in the vicinity of Big Sandy, Mr. Marlow?

A. Three or four thousand acres, I should think.

Q. 258. How much hay did you cut during the summer of 1897?

A. Oh, I guess 2,500 tons, probably.

Q. 259. Did you have any of that hay left over?

A. No, sir; didn't have enough to set a hen on.

Q. 260. That was all consumed during the winter of 1897 and 1898?

A. Yes, had to buy some in the spring.

Redirect Examination.

Q. 1. Mr. Marlow, you have spoken about these Quaintance cattle from Boulder, at \$26.50 per head; what would it cost to get these cattle down to your ranch in the neighborhood of Big Sandy?

A. And turn them out?

Q. 2. Yes, sir.

A. Well, I guess it would cost a dollar and a half or two dollars a head.

Q. 3. You say there was a limited number of three year old steers bought from Quaintance—some fifty in number, I think you said?

A. I didn't mention any number.

Q. 4. Would that fact affect the value of the animals or the selling price if they were bought in the herd?

A. Certainly it would.

Q. 5. Would it increase or diminish it?

A. It would increase the value, of course, if it had the requisite number of three year old steers in it.

Q. 6. Can you tell us approximately how much more it would make?

A. Well, if that band of cattle had had its regular quota of beef cattle in it, it couldn't have been bought at the time that we bought them for less than thirty or thirty-one dollars a head at that time.

Q. 7. Can you give us an estimate of the probable cost of transporting and getting the Gaddis cattle over to your place? A. No, sir.

Q. 8. They would be driven, would they?

A. We expect to drive them. It would probably cost a dollar or a dollar and a half a head. Mr. McNamara's testimony would probably be better upon that subject.

Q. 9. I understood you to say you could not give the approximate price, or the exact price of steers—which was it, without reference to your books?

A. Not the exact price; I said I could only give it approximately.

Q. 10. Well, you declined to give Judge Cullen, even approximately, an answer upon that matter? How long would it take you to get your books here?

A. Only a few minutes.

Q. 11. Coming down to this October 21st and 22d, at Oswego, did this controversy which you had on the 21st, or rather on the 22d—with Mr. A. W. Niedringhaus and Mr. Sharp, excite any illfeeling on the part of those gentlemen.

By Mr. CULLEN.—I object to that as immaterial.
(Sustained.)

By the MASTER.—Ruling reserved.

A. Why Mr. A. W. Niedringhaus kept his temper and acted very nicely. My recollection of it is that Mr. Sharp lost his temper several times; in fact acted quite ugly.

Q. 12. Now, the herd of cattle that were driven down to the Fort Peck Agency were delivered on October 22d, weren't they? A. Yes, the 22d.

Q. 13. And the other bunch had been delivered on October 21st? A. Yes, sir.

Q. 14. Had you been together the evening of the 21st of October, yourself and Mr. McNamara, and Mr. Sharp and Mr. A. W. Niedringhaus? A. No, sir.

Q. 15. Did you spend the evening together?

A. No, sir.

Q. 16. Or part of the evening?

A. Not that I recollect of.

Q. 17. I will ask you if you didn't take supper together.

A. Come to think about it, I believe that Mr. A. W. Niedringhaus did come up and take supper with us; I wouldn't be positive about Sharp.

Q. 18. I will ask you whether in the course of the dealings with The Home Land and Cattle Company for the sale and delivery of the cattle in question, any drafts were ever asked for or given prior to the completion of the delivery—of an entire delivery.

A. No, sir, never.

Q. 19. Now, what was understood by the words "complete delivery" or "entire delivery"?

By Mr. CULLEN.—To which we object, for the reason that the parties have defined by their contract what the completion of a delivery was.

(Sustained.)

By the MASTER.—Ruling reserved.

A. What was that?

Q. 20. What do you mean by the words "entire delivery"?

A. I mean all the cattle we got there on one trip; that they delivered in one, two, or three days.

Q. 21. As I understand you, if it took one, two or more days to receive the animals then held at the shipping point, that is what you termed a delivery?

A. Yes, sir.

Q. 22. And it was not until after the completion of such delivery as that, that the drafts had ever been asked for?

A. No, sir.

Q. 23. Mr. Marlow, I overlooked this morning to ask you what would have been the probable damage to you by reason of the fact, as you testified this morning, that your Indian contracts could not be carried out without the animals in question that you had contracted for with The Home Land and Cattle Company?

By Mr. CULLEN.—We object to the question for the reason that there is nothing in the issues in this case to which the testimony would be relevant, and it is not

an action to recover any damage, nor is the witness' opinion upon this question admissible.

(Overruled.)

By Mr. WALLACE.—The question in issue is: Did these cattle have a special or peculiar value to the complainants in this action? And one of the reasons assigned is that they were acquired in contemplation of their use in connection with these Indian contracts, and their place could not well be supplied.

By the MASTER.—Ruling reserved.

A. I don't think it would be possible to estimate the damage that would have occurred to us.

Q. 24. Now, you say you made preparations to winter stock in the winter of 1897 and 1898; can you give us an estimate of the damages which would have accrued to you had you not received the animals that you had contemplated to winter with such hay, and on such lands?

A. No, sir, I don't think it is possible to estimate in dollars and cents. We had large quantities of hay put up around there from a ranch that we have there. We have a number of men employed that we have to keep the year round for that class of work which has to be done around a ranch, and we have to get all the stuff we possibly can to work stock with, and it is impossible to tell what damage we suffered.

Q. 25. It couldn't be figured out?

A. It would be pretty hard to figure it out.

Q. 26. Well, could it be done at all?

A. No, sir, I don't think it could be figured out.

Q. 27. You have been asked considerably about the conversation Mr. McNamara had with Mr. W. F. Niedringhaus about October first, 1897, at Oswego; I will ask you whether you overheard anything in that conversation relating to the shortage of nine thousand head of beef steers.

A. Yes, sir, I heard Mr. W. F. Niedringhaus and Mr. McNamara discussing the matter there about October first or second.

Q. 28. Do you remember what Mr. Niedringhaus said, and if so please state it?

A. He asked Mac. about how many cattle he thought they were going to be short—

Q. 29. What kind of cattle?

A. Beef cattle. On that nine thousand head, and Mac. told him he was going to be short about two thousand head. He said he didn't think it possible that they were going to be short that number of head.

Q. 30. Now, did he mention any number himself that he thought they would be short?

A. No, I don't remember any particular number he mentioned that they would be short. He and Mac. walked off talking about the matter, I recollect, and part of the conversation I didn't hear. They went away talking about the matter; but I heard Mr. Niedringhaus make that offer; but Mac. turned right from his elbow—not much further than from here to that window—and said that Mr. Niedringhaus—

By Mr. CULLEN.—We object to what Mr. McNamara said.

Q. 31. Did Niedringhaus hear what Mac. was saying— or anything of that kind occur?

A. No, it wasn't what Mr. Niedringhaus said to Mr. McNamara that I heard; I didn't hear that, except that Mac. turned right from him, and told me what he had said to him.

Q. 32. But these other portions of the conversations that you have testified to you heard yourself?

A. Yes, sir.

Q. 33. As far as you know, had this steer shortage question been discussed prior to that time?

A. That is the first time it was ever discussed in my presence. Everybody recognized that there was going to be a shortage in the steers. I will say this, with reference to that conversation: There is a part of that conversation that I did hear. Mr. Niedringhaus came back from the ranch the next morning after he went home to think the proposition over which Mac. told me he went home for, and when he came back the next morning from the ranch, he said to Mac., in my presence, which I heard—he says: "We cannot accept your proposition; I have thought it over, and we cannot accept it; but we will give you twenty thousand dollars to drop this contract right where you are, and this is the best we will do," and Mac. said, "We will not accept the proposition."

Q. 34. And this conversation was on the 2d?

A. Yes, on the second; I think the first talk was on the first—yes, I guess the second. The first talk was on the first, and Mr. Niedringhaus went home on the south side of the river to chew the thing over in his

mind over night, and that was his reply to it when he came back the next morning.

Q. 35. Do you remember any other remarks made by Mr. Niedringhaus? A. No, sir.

Q. 36. Now, Mr. Marlow, can you tell us the price and the fluctuations in the prices of beef and stock cattle between May 27th, 1897, and October 22d, 1897, in the Chicago market, and have you any papers or memoranda made by you, or under your direction which, by referring to, you could refresh your memory and give the prices?

A. You ask me what the fluctuations in Chicago are?

A. I have here a copy of our account sales for all the cattles we sold during the year 1897.

Q. 37. Now, by referring to your account of sales, can you answer the main part of the question?

By Mr. CULLEN.—We object to his referring to the account sales, unless it appears that the same was made by himself, or under his direction, and that he knows of his own knowledge that the same is correct.

(Overruled.)

A. I absolutely do know, for I wrote it all myself, and took it from the sales. There is no market in Chicago for stock cattle. I would answer the question as to beef cattle in Chicago, between May 27th, 1897, and October 22d, 1897.

Q. 38. Yes, give us the fluctuations?

A. We didn't ship any cattle out of this country in May to the Chicago market. There is no market there for our class of cattle at that time of the year. From the time we began shipping these cattle to the close of

the season in October, the market stood about the same; that was along in the neighborhood of from four cents up to \$4.50 per hundred pounds for steers.

Q. 39. How long did you say that price remained steady?

A. During the shipping season from the time we commenced shipping in cattle till October.

Q. 40. Did the prices remain the same?

A. No, but that was about an average price.

Q. 41. Now, the price that you got, \$4.50 a hundred, what would be the value of the steers, beef cattle, in the season of 1897.

A. The easiest way to answer that question is to get the average of what these cattle brought in Chicago.

Q. 42. Give that?

A. The average net value of all the steers that were shipped out of that N. herd for that year was \$35.50 in Chicago, 6,055 head.

Q. 43. Well, what was the average value of the spayed cattle?

A. The spays and cows were sold together.

Q. 44. And what would you say as to the value in 1897—after October 22d?

A. In Chicago?

Q. 45. Yes, sir; in Chicago.

A. I don't know as I can give that, because we don't ship any cattle there after that time of the year.

Q. 46. Did you ship any cattle there in 1898?

A. Yes, sir.

Q. 47. In 1898—in the shipping season of 1898, what

was the average beef cattle worth or selling for in Chicago?

A. Well, this particular kind of cattle would probably have brought, during the season of 1898, I should think, judging by our sales this year, from three to four dollars per head more.

Q. 48. More than the figures in 1897?

A. Yes, sir.

Q. 49. That would be how much?

A. Run up to \$39.00 or \$39.50. I would say, however, in giving this testimony that that is largely on the sales of the Texas cattle. I can turn to the cattle shipped from Big Sandy, and show that they netted us more.

Q. 50. The prices then that you have given in your previous question are based on this herd of cattle?

A. Well, this herd of cattle which were largely Texas cattle. About \$4.35 was the top market price on any of these cattle, and that was for only a few of them. A majority of these cattle brought from \$3.90 up to along about \$4.10.

Q. 51. And at those selling prices, what would be the selling price of the average animal?

A. Along about that price.

Q. 52. Well, I mean for the animal?

A. Well, that brings the average up to about \$35.50.

Q. 53. Well, what was done with the spays?

A. Sold along with the cows and heifers.

Q. 54. You are sure of that; you can confirm that by looking up the record, can you? A. Yes, sir.

Q. 55. You said in your cross-examination that the

selling price of beef in Chicago affected the value of stock cattle in this country; can you, now that you have the figures before you, can you tell us what would be the average value in Montana of the stock cattle of the kind that we are discussing for the years 1897 and 1898, the market value?

A. Well, I consider from the price that these cattle were bringing, from the time that we bought them on, there was an enhancement in the value of them. We wouldn't have been able to have bought them at the termination of the season at the prices we bought them for on the 27th of May.

Q. 56. Would you have been able to buy similar cattle, a similar class of animals anywhere?

A. No, sir; we couldn't have bought them at any price that time of the year.

Q. 57. Then as I understand you the price of stock cattle advanced? A. Yes, sir.

Q. 58. Did that apply to the year 1898?

A. Yes, sir.

Q. 59. I will ask you then how the price of this class of animals compared with the prices for similar animals in 1896?

A. Well, they were very much better in 1897.

Q. 60. They were still enhancing?

A. They were still enhancing, yes, sir.

Recross-Examination.

Q. 1. How do you know what they brought in 1896 in the Chicago market?

A. Had a copy of the account of sales of all the cattle that we sold in 1896.

Q. 2. Have you got that yet? A. Yes, sir.

Q. 3. Will you bring it in, so that we can see whether you are right or not, Mr. Marlow? A. Yes, sir.

Q. 4. Now, how do you know what Texas steers brought in the Chicago market in 1898, similar to the steers from this herd?

A. I know what all these cattle sold brought this year, out of the same herd of cattle.

Q. 5. What did they bring?

A. Brought more money than they did the year before.

Q. 6. How much more? A. I wouldn't say.

Q. 7. Have you got those figures?

A. Yes, sir; I have got all those figures up at the office too.

Q. 8. What did it cost you to get your cattle from Oswego up to Big Sandy?

A. From Oswego to Big Sandy?

Q. 9. Yes, you shipped quite a lot of these cattle to Big Sandy, did you not?

A. Yes, sir; shipped a lot of them back.

Q. 10. Well, what did it cost you, Mr. Marlow?

A. I guess it cost us from a dollar to a dollar and a half.

Q. 11. You are sure it didn't cost you two dollars a head to get them up there?

A. Oh, it might have; I wouldn't be positive; that is a matter of record; we can tell exactly what it did cost.

Q. 12. Well, Mr. Marlow, can you be more definite?

A. Well, I will make my answer twenty dollars a car.

Q. 13. Let me see; when were these Quaintance cattle bought?

A. Well, I can't tell you exactly; it was in December, I guess.

Q. 14. When were they delivered?

A. They were delivered in April; I remember that distinctly.

Q. 15. What did they cost per head to deliver?

A. Well, I don't remember about that; I think the rate on them was \$25.00 a car, if I remember right.

Q. 16. How many cattle did you buy of Quaintance?

A. I think we got between 1,750 and 1,800 head of cattle from Quaintance, as far as I can recollect.

Q. 17. Now, you have said something about that band of cattle not having its proper proportion of beef cattle. What would be the proper proportion for a herd of that size to have—three and four year old steers?

A. Ought to have 300, anyway; three hundred head of three year old steers.

Q. 18. What did you reckon as beef cattle?

A. Certainly nothing less than full three year olds. We don't pretend to ship all of our three year olds; but only the best of them.

Q. 19. No dry cows or spayed heifers reckoned as beef?

A. Yes, they are beef; but there was nothing of that kind in that herd; it wasn't a regular herd of cattle; it was cattle that we picked up around the country and fed through the winter.

Q. 20. Now, you say that prior to this time no drafts had been made until all of the cattle—prior to October 21st, no drafts were made until all the cattle that were brought in were delivered. Take, for example, the shipments that were made in August; how many drafts were made during that month?

A. I wasn't present at any other deliveries.

Q. 21. You don't know?

A. Yes, I do know something about it, too.

Q. 22. Well, let us have what you know about it.

A. Cattle that were delivered August 18, 19, 20 and 21st, I furnished a list to the stenographers here. We paid them in one draft when we got that batch of cattle—one draft on Rosenbaum Brothers.

Q. 23. The cattle that were delivered September 30th, and October 1st and 2d, when were they paid for?

A. Paid for in another draft the same way; the whole batch together.

Q. 24. There had been some controversy, hadn't there, about your delay in sending drafts—between you and the National Bank of Commerce?

A. Not to my knowledge. I don't know of one word of controversy upon that subject at all. Our relations up to that time were as pleasant as pleasant could be.

Q. 25. Had there been any delay in sending drafts?

A. No, sir; there never was; we paid at once for the cattle, as soon as we got them.

Q. 26. Now, as I understand you, you bought these cattle from The Home Land and Cattle Company, having in mind the contracts which you had expected to get for the delivery of beef to the Indian Agency, to a certain extent?

A. Yes, sir.

Q. 27. How many of these cattle were used for filling your contracts?

A. I couldn't tell you exactly.

Q. 28. Well, approximately?

A. Well, anywhere from 500 to 1,000 head for beef.

Q. 29. That is all that was used for filling contracts?

A. A thousand head probably. That is a hard thing to say.

Q. 30. You filled all of the contracts which you had in 1897 with the Government?

A. Yes, sir; we filled all the contracts for beef.

Q. 31. There was no damage claimed against you by reason of any shortage, or by reason of the quality of the beef?

A. Where?

Q. 32. On the part of the Government?

A. No, sir; we have always filled our contracts.

Q. 33. Then, as a matter of fact, Mr. Marlow, you were not actually damaged, so far as your beef contracts were concerned, by the failure to deliver the 1895 head of beef?

A. Well, we filled all of our contracts. I cannot say that we were damaged by failing to get that particular lot of cattle.

Q. 34. Now, with reference to the provision you had made for feeding stock up there; I understood you to say that all your fodder, hay, etc., that had been provided had been consumed during the winter of 1897 and 1898?

A. Yes, sir.

Q. 35. You weren't damaged, then, by reason of the shortage in this respect?

A. We made no claim; we expected to feed the calves and young stock.

Q. 36. How many stock cattle out of this lot did you have at Big Sandy? A. Out of what lot?

Q. 37. The lot you purchased of The Home Land and Cattle Company; how many all together were taken up to Big Sandy? A. The whole thing?

Q. 38. Yes, sir; approximately, can you tell?

A. Yes, sir; can figure that out all right.

Q. 39. Yes, you have already given the figures of what you shipped, and the total number of what you received?

A. 8,965 head.

Q. 40. On the first day of November, 1897, about how many head of stock cattle did McNamara and Mariow own?

A. How many stock cattle we owned on the first day of November, 1897?

Q. 41. Yes, sir? A. I don't know.

Q. 42. About how many did you own at that time?

A. I don't know.

Q. 43. Aside from those you got of The Home Land and Cattle Company, did you own ten thousand head?

A. I don't know.

Q. 44. Have you any means of finding it out.

A. I don't believe there is any good means of finding it out.

Q. 45. Are you able to say about what proportion the number you got of The Home Land and Cattle Company, bore to the number of cattle you had?

A. No, sir; I know exactly what we got of them; but I don't know what proportion they bore to the others.

Q. 46. How many did you buy that year, aside from what you got of The Home Land and Cattle Company?

A. I answered that once; about three thousand head.

Q. 47. You had those that winter?

A. No, we sold some of them.

Q. 48. Well, how many stock cattle did you have that were wintered there at Big Sandy that winter?

A. Well, I don't know; I couldn't even figure that out, because we kept no track of the beef we shipped out of that. We didn't keep the beef sales separate out of that. We did keep the beef sales separate from this herd, because it was a big herd. The others, they were with the other cattle, and no track was kept of them at all.

Q. 49. Well, what class of cattle did you have during the winter of 1897—that you fed?

A. Calves that were weaned from their mothers, and that were big enough to take away in the fall; and cows with calves that were too small to take away from their mothers; then cows, yearlings, bulls and that kind of stock.

Q. 50. Do you remember how many you fed that winter—the winter of 1897 and 1898?

A. We probably fed from three thousand to thirty-five hundred head. I don't know exactly.

Q. 51. What proportion of the number you fed came from the N. Bar N. herd? A. I don't know.

Q. 52. Can you tell about what?

A. No, sir; couldn't begin to tell.

Q. 53. Now, Mr. Marlow, don't you know, as a fact, that less than a third of the cattle that you fed that winter, came out of the N. Bar N. herd?

A. Do I know that less than a third—

Q. 54. Must have come out of that N. herd?

A. No, sir; I don't know it to be a fact; I don't believe it to be a fact; I think, though, very much more than a third of the stuff we fed did come out of that N. herd.

Q. 55. And how much larger than a third can you say?

A. I wouldn't say, because I don't know. Mr. McNamara can tell you more about these things.

Q. 56. So you don't know that you suffered any actual damage from your failure to fulfill these contracts, or not so far as the hay was concerned.

A. It seems to me you are working it cross-ways, Judge. We had no shortages. We got feed for all of the stuff that we expected to get out of them.

Q. 57. So there was no actual damage, was there?

A. Judge, the people were not short on any of the beef steers in that herd.

Q. 58. You were not actually damaged so far as hay was concerned, by reason of that fact?

A. Well, we would have been damaged if we hadn't got this 457 head of stock cattle. We took care of that.

Q. 59. How many calves were there in that 457 head of stock cattle, Mr. Marlow? A. 156 head.

Q. 60. Were those all fed that winter?

A. Yes, sir; I think every hoof of them was fed.

Q. 61. Then of the three thousand that you fed, 157 head came out of that 457 head? A. Yes, sir.

Q. 62. How many weak cows were there that you fed during that winter? A. I don't know.

Q. 63. Did you feed the entire 457 head?

A. No, I don't think we did the entire 457 head. I think there were probably some that were decent enough to let go.

Q. 64. Well, you were there a good share of that winter, weren't you, Mr. Marlow?

A. No, I always tried to get away from there.

Q. 65. Now, Mr. Marlow, I wish you would refresh your recollection, and tell us when this conversation that you testified about took place, as nearly as you can—the conversation that was interrupted, when Mr. Niedringhaus went to the ranch and returned the next morning?

A. I think, as well as I can recollect, it was about the first of October. We had cattle there which they had delivered; we had cattle on the 30th day of September and the first and second day of October, and I think the talk was before they finished that delivery; if that

was the case, that would be about the first day of October, the second day of that delivery down there. That is my recollection about it.

Q. 66. That is a part of the same conversation that you testified to. There was but one conversation that you undertook to tell about was there.

A. The conversation on the shortage.

Q. 67. Yes, sir.

A. No, sir; only that one conversation.

Q. 68. Now, refresh your memory; is it not clear to you that the conversation took place after the cattle had been delivered?

A. No, sir; it isn't absolutely clear that it took place after they were all delivered; I couldn't say whether they were entirely through or not. I know that Mr. Niedringhaus went home over night to think this matter over, and came back, and the end of the conversation was on the following day. It has been Mr. McNamara's and my custom, since I have been there, to get out of that place at five or six o'clock when the train was going west; and if we had been through with the delivery of the cattle, we would have been going home. That is my reason for thinking it. It was on the first day of October, and there was still some cattle to be delivered.

Q. 69. If you said it took place on the first day of October, after the delivery of the cattle, it was liable to be a mistake?

A. Yes, sir; I believe it was the first day of October, before we got entirely through with the delivery of the cattle.

Q. 70. What was the price of cattle in Chicago in 1898, during the season of 1898, how did it range per pound? Beef is always sold there by the pound, hasn't it?

A. Yes, 100 pounds. We were selling a different class of cattle that year. Take our native cattle; they ran this year from four to four and a half cents per pound; we got as low as \$3.85 on some cattle. I should think this year our cattle averaged from \$4.15 to \$4.25.

Q. 71. Now, you have said what the N. cattle brought last year in the Chicago market, but what was that per hundred pounds, how did that range? By last year you mean the year 1898?

A. I don't know; I must look up the record on that. There was too many of them to remember.

Q. 72. Do you not recall the fact that it brought less than the beef which you sold from your own herd?

A. That we sold from our own herd the same year?

Q. 73. Yes, sir. A. Certainly.

Q. 74. About how much?

A. Well, I wouldn't say how much. When I say I don't know how much they brought this year, how can I tell you? I know that Texas cattle ran ten dollars less per head; they didn't weigh as much, and they didn't bring as much, either. That is the way they ran in 1897, about the same way.

Q. 75. Do you recall whereabouts this conversation with Mr. Niedringhaus took place the following morning, when he came back and said he wouldn't accept the offer that had been made? A. Yes, sir.

Q. 76. Where was it?

A. Right close to the corner of the stock yards.

Q. 77. Who was present?

A. I don't think there was anybody present except Mr. McNamara and myself.

Q. 78. This was Mr. H. L. Niedringhaus?

A. No, sir; Mr. W. F. Niedringhaus.

Redirect Examination.

Q. 1. In answer to a question of Mr. Cullen, he asked you, did he not, whether you had suffered any damage by reason of your Indian contracts, from the shortage of the steers that were delivered in 1897, and you said no you didn't think you had?

A. Yes, sir; I understood it. If we had suffered any loss by the failure of that company to deliver the 1895 head of steers.

Q. 2. Now, I will ask you whether you would have suffered any loss in your Indian contracts, if you hadn't received 457 head which are the subject matter of this suit? A. Yes, sir; we would.

Q. 3. And that is what you said in your direct examination--the loss, that you couldn't estimate in dollars and cents?

A. Yes, sir; but we would have suffered a loss on that batch of cattle on Indian contracts if we hadn't had them.

Q. 4. That would be the same condition of affairs as to wintering the animals? A. Yes, sir.

Q. 5. Then, if you had not received this 457 head, you would have suffered a loss in preparing for this stock?

A. Yes, sir.

Q. 6. And that is the loss that you cannot estimate in dollars and cents? A. Yes, sir.

Q. 7. And further in answer to a question by Mr. Cullen, you stated that you had delivered about a thousand head of beef cattle on Indian contracts; is that the only kind of animals you delivered on Indian contracts?

A. No, sir; there was various other kinds of animals.

Q. 8. What kind of animals?

A. We sold bulls out of that 457 head that were not delivered; we sold one, two and three year old heifers that we agreed to sell out of that 457 head of cattle.

Q. 9. Now, aside from this 457 head, can you tell us approximately, beside steers that were turned over to you for filling Indian contracts?

A. No, sir; that would be hard to say. We filled a contract for one and two year old heifers in the spring out of those we had wintered and took care of, this 457 head of cattle, and others of our own as well; so it would be hard to define how many were N's and how many were our own.

Thursday, January, 26th, 1899.

Morning Session.

Mr. Marlow recalled, and his examination continued.
(By Mr. McINTIRE.)

Q. 10. How would the firm of McNamara and Marlow have been damaged, so far as their Indian contracts

were concerned if they hadn't received from the receiver appointed by the Court the 457 head of cattle?

A. We would have been damaged, as I said before, through lack of having stuff to feed, that we had made preparations to take care of them. Another way we would have been damaged would have been from a lack of stuff that we disposed of on Indian contracts, that we wouldn't have had to dispose of.

Q. 11. Did you not have in your herds more than 457 head of cattle, aside from what would be required to fill all of your Indian contracts?

A. We probably did; that is a hard question to answer. 457 head brings us down to a pretty fine point. We had a good many head of cattle, and used them for filling Indian contracts more than 457 head.

Q. 12. How much hay did you buy in the spring of 1898?

A. I don't recollect, exactly; a small quantity the last end of the season.

Q. 13. About how much do you mean by a small quantity?

A. We may have bought perhaps a hundred tons; somewhere in that neighborhood; I am not positive about it. I don't believe to exceed that.

Q. 14. Now, when you say that if you hadn't got that 457 head you couldn't compute the damage which you might have sustained on account of your Indian contracts, do you mean that the damage was so great or so small that you couldn't compute it?

A. Well, I don't mean either one. I meant what I said, that it was a damage that would be hard to compute, that I wouldn't care to undertake to compute it.

Q. 15. Is the same true as to the matter of hay that you spoke of? A. Yes, sir; it is true.

Recross-Examination.

Q. 1. What was the character of the spring of 1898 for severity or mildness?

A. It was an unusually hard spring.

Q. 2. And it ran down to what portion of the year?

A. The month of March was very bad, and we were feeding cattle up to perhaps the middle of April. It was very late.

Q. 3. And of the cattle that were being fed, were any of them of this 457 head that had been turned over to the receiver? A. Yes, sir.

Q. 4. And it was by reason of the fact of the severity of the season, and the necessity of feeding all these animals that the stock of hay which you had put up, or bought in 1897, and the quantity of hay you bought in the spring of 1898 was consumed, is that right?

A. Yes, sir.

Redirect Examination.

Q. 1. Mr. Marlow, yesterday you were requested by Mr. Cullen to produce such papers as you had, showing the average prices per cwt. of such animals as were shipped out of the herd of The Home Land and Cattle Company in 1898; have you now got those papers?

A. Yes, sir.

Q. 2. Referring to those papers, what have you to say as to such average price?

A. I haven't figured the average price per hundred pounds on these cattle; the customary way of figuring cattle is per head. It is a net value of \$28.75 per head, including nearly a hundred head of calves in about 500 head. If the calves were not included, the average price of the animals would be more.

Q. 3. The branded calves would be the calves of 1897?

A. No, sir; the branded calves of 1898.

Q. 4. And in arriving at this average per head, I presume you have the number of animals that were shipped by the company? A. Yes, sir.

Q. 5. What was that number?

By Mr. CULLEN.—We object to that for the reason that it is hearsay, and not the best evidence.

(Overruled.)

A. 497 head.

Q. 6. Shipped by The Home Land and Cattle Company in 1898?

A. Yes sir; and other people for them.

Q. 7. Other people for them? You mean by that they were strays, do you? A. Yes, sir.

Q. 8. So that the total number was how many?

A. 497 head.

Recross-Examination.

Q. 1. This information with reference to the number of head shipped by The Home Land and Cattle Company was taken from the office of the stock commissioners, was it not?

A. It was gotten from the office of the stock commissioners in Helena, and also from the office of the inspector of stock in Chicago---Mr. Landers. Also accompanied by account of sales of Rosenbaum Brothers & Co.

Mr. MARLOW, recalled, testified as follows:

1st Q. You were present and heard the inquiries of Judge Cullen on the last hearing, of McNamara about the drafts and the number of deliveries etc.?

A. I was.

2d Q. Have you since gotten your books and accounts bearing upon this? A. Yes, sir.

3d Q. Produce them will you?

A. Yes, sir. (Produces books.)

4th Q. Have you prepared any abstracts from the books?

A. Yes, sir; I have prepared abstracts covering the whole transaction.

5th Q. Have you these abstracts with you?

A. Yes, sir.

6th Q. You are a bookkeeper yourself, are you not?

A. Yes, sir.

7th Q. Of how many years' experience?

A. In 1882 I began keeping books for Mr. McNamara.

8th Q. Did you ever do any experting?

A. I don't claim to be an expert.

9th Q. But you have experted books, have you not?

A. Yes, sir; several times.

10th Q. Do you understand those books?

A. Yes, sir.

11th Q. Have you abstracts showing the results of this transaction? A. Yes, sir.

12th Q. You may produce your abstract.

(Abstract introduced in evidence, marked Exhibit "C.")

Mr. WALLACE.—I wish to file it and offer it in connection with Mr. Marlow's testimony as a bookkeeper.

13th Q. How many drafts do you find were issued by the plaintiff in payment for these cattle delivered in 1897 from the N-N herd?

A. Eleven actual drafts were issued by us; two charges or payments in addition to that were made by the Rosenbaum Brothers on our account without any drafts.

14th Q. How much was the first payment?

A. Fifty thousand dollars.

15th Q. How was that payment made?

A. It was deducted from the first delivery of cattle made to us, amounting to \$43,150, the first delivery, from which one-half of the first payment was deducted, \$25,000, and our draft number 18,150 sent to the bank.

16th Q. Covering the balance of the first delivery?

A. Yes, sir.

17th Q. How many head were there?

A. 1,726.

18th Q. How many days did it take to make that delivery? A. Two days.

19th Q. Now going back to the first fifty thousand dollars paid, how was the balance of it distributed?

(Defendant objects; immaterial; there is no controversy about the fifty thousand dollars. Overruled.)

By ATTORNEY FOR PLAINTIFF.—There is a controversy as to the number delivered and whether drafts were given at the end of each delivery; as the amount of this first draft will not correspond with the total due for the 1,726 head at twenty-five dollars per head, we ask him to explain; this twenty-five thousand dollars was deducted and draft made for the balance; we propose to explain it by the apparent deficit in the third delivery on account of some subsequent delivery.

A. The second half of that payment was deducted from the delivery of August 16th amounting to \$84,975; there was deducted from that, first, the second half of this \$50,000; the payment of fifty thousand to the firm of Rosenbaum Brothers, on account of notes which this company owed them, and that was settled between themselves and our draft was made for \$9,975.

20th Q. In other words, out of the 4th payment you reimbursed yourselves and your draft was made for the balance? A. Yes, sir.

21st Q. How many head were in that delivery?

A. 3,399.

22d Q. How many days did it extend over?

A. Four days.

23d Q. You spoke of July 11th as the first delivery; Mr. McNamara mentioned a few head delivered on the 1st?

A. Yes, that is the reason for these two receipts for those deliveries the 1st of July and the 11th of July.

24th Q. Was this small amount on the first paid for on the 11th? A. Yes, sir.

25th Q. You speak of the 11th as the completion of the first delivery? A. Yes, sir.

26th Q. You say fifty thousand were distributed between July 11th and August 16th?

A. Yes, sir.

27th Q. How many head were delivered on the second delivery? A. 1,409.

28th Q. How many days did that extend over?

A. One day according to this record.

29th Q. How many drafts were those deliveries paid for in? A. One draft.

30th Q. What did it amount to?

A. Those cattle amounted to \$35,225. We sent our draft No. 2 for that amount to the National Bank of Commerce.

31st Q. Is the first covered by one or more than one?

A. First one draft and half of first payment.

32d Q. Well, the third delivery?

A. July 29th, 679 head.

33d Q. Extending over what period?

A. One day.

34th Q. Paid for in how many drafts?

A. Same number.

35th Q. You have given us the fourth; now, tell us the fifth? A. 3,806 head.

36th Q. Extending over how many days?

A. Five days according to this record.

37th Q. Payment for this five days' delivery for that number of head was made in how many drafts?

A. One draft for \$89,859.70, and the balance of the

indebtedness due by this company to Rosenbaum Brothers, which was deducted by Rosenbaum Brothers and charged to us, \$5,290.30; that is, in making this payment for all of these cattle covered by that delivery of five days, we first paid a balance of the debt due from the company to Rosenbaum Brothers in the amount named and sent a draft for the remainder.

38th Q. That is the one of August 26th.

A. Yes, sir.

39th Q. Now, the next delivery was for how many head?

A. 2,351.

40th Q. What day was that?

A. September 2d, 3d, and 4th.

41st Q. That covered how many days?

A. Three days. That delivery was 2,351, and amounted to \$58,775.00.

42d Q. Covered by how many drafts?

A. Three drafts.

43d Q. What were the amounts?

A. The 2d and 3d of September, \$12,675, and the 4th draft, No. 11, \$33,425, the balance of that delivery.

44th Q. There were two drafts of equal amount?

A. Yes, there were the same number of cattle each day.

45th Q. And the third day?

A. The third day there was a larger number.

46th Q. How many were there? A. 1,337 head.

47th Q. That would be at least two trainloads, I presume?

A. Yes, it would be.

48th Q. Did you pay for that in a single draft?

A. Yes, sir.

49th Q. Now, your next delivery was when?

A. 1,649 head on September 30th, October 1st, and 2d, three days.

50th Q. The payment was made when?

A. That bunch amounted to \$41,225. On October 1st draft for \$13,025, on the 2d our draft, No. 13, for \$13,825, and again on the 2d draft, No. 15, for \$14,375.

51st Q. This takes you down to the time of the next delivery when the trouble began?

A. Yes, sir; cattle credited and the account charged with shortage?

52d Q. Do you recollect anything about whether there was any discussion between yourselves and the representatives of The Home Land and Cattle Company, or between The Home Land and Cattle Company and Rosenbaum Brothers, as to what was to be done with this fifty thousand dollars?

(Defendant objects as immaterial, the fifty thousand dollars being admitted in the pleadings. Sustained.)

A. Yes, there was a discussion bearing on that.

53d Q. What was said concerning it?

A. I cannot recall the exact words.

54th Q. Well, the substance of it?

A. The Rosenbaum Brothers were asking for either a part or all of this payment and the company wished the payment themselves, and it was settled that they were to take part.

55th Q. The Rosenbaum Brothers were asking it for what purpose? A. Their indebtedness.

56th Q. They wanted pay from this company of their indebtedness? A. Yes, sir.

57th Q. Out of this first payment?

A. Yes, either part or all of it.

(Defendant moves to strike the testimony of the witness out with reference to the payment of the fifty thousand dollars, for the reason that same was immaterial. Sustained.)

58th Q. Was there anything said by the representatives of The Home Land and Cattle Company there present at that time between yourselves as to any chattel mortgages against the cattle?

(Defendant objects, immaterial. Sustained.)

A. Yes, sir; there was some conversation, of which I do not recall the exact words, but we had a memorandum of some chattel mortgages which were out against the cattle, and there was a discussion as to the order in which they should be paid off, but it was largely between W. F. Niedringhaus and Rosenbaum and I did not pay close attention to it; we were not concerned.

59th Q. But they were mentioned?

A. Yes, sir; they were.

60th Q. The fact that they existed, etc.?

A. Yes, sir.

61st Q. And in this discussion with Niedringhaus was Rosenbaum acting as a broker or creditor?

(Defendant objects; not material to any issue made by the pleadings. Sustained.)

A. I should say to a certain extent he was acting in both capacities.

62d Q. Well, as to the particular matter of the chattel mortgages was he having the discussion as a creditor or as a broker?

A. That I would not undertake to say. The matter was to be settled there between The Home Land and Cattle Company and those people as to where these payments were to go, etc., and we left it all to the Rosenbaums.

63d Q. From what source were these liens released, if at all?

A. We took care of ourselves on that proposition by having a consent to the sale executed in writing by all people holding liens against the cattle.

64th Q. The mortgages?

A. Yes, sir. Our first payment was not turned over until the releases were furnished.

65th Q. Was there anything said about the proceeds?

A. Yes, there was.

66th Q. What was it?

A. That was a part I paid little attention to; it was between the Rosenbaums and Niedringhaus.

67th Q. Do you know by the talk whether the mortgages were paid off independent resources or from the proceeds of the cattle?

A. As far as Rosenbaum was concerned, they were paid off in order of precedence and from proceeds of the cattle.

68th Q. Was Mr. Rosenbaum a mortgagee?

A. Yes, sir; he was, if I recollect rightly.

(Defendant moves to strike out all testimony relative to the mortgages, for the reason that the same is not within the issues of this case. Sustained.)

Cross-Examination.

69th Q. Whose writing is that in the book to which you have referred?

A. From the top of the book down to the date of September 30th was our bookkeeper's; after that my own.

70th Q. What do you denominate that book?

A. This book here?

71st Q. Yes, sir.

A. We have no name for it; it is in the nature of a record book for all the cattle we handle, Indian contracts, etc.

72d Q. All you know about the deliveries and the drafts made for them prior to September 30th is simply what you find entered in this book, is it not?

A. Yes, sir; with the exception of the matter of the payment of the August proposition, I was present when that was turned over, and I know that of my own personal knowledge.

THOMAS A. MARLOW.

Subscribed and sworn to before me this ninth day of February, 1899.

HENRY N. BLAKE,
Master in Chancery.

C. J. McNAMARA, one of the complainants in the above-entitled action, being called as a witness on behalf of the complainants, after being first duly sworn by the master, testified as follows:

Direct Examination.

(By Mr. H. G. McINTIRE, of Counsel for Complainants.)

Q. 1. What is your full name, Mr. McNamara?

A. C. J. McNamara.

Q. 2. Your age? A. Forty-three.

Q. 3. Your occupation?

A. I am in the stock-growing business.

Q. 4. What is your present place of residence?

A. Big Sandy, Montana.

Q. 5. How far is Big Sandy from Glasgow?

A. About two hundred miles.

Q. 6. How long have you lived at Big Sandy?

A. Why, about ten years.

Q. 7. Both of these points are on the line of the Great Northern Railway, are they? A. Yes, sir.

Q. 8. You are one of the complainants in this action?

A. Yes, sir.

Q. 9. And a member of the firm of McNamara and Marlow? A. Yes, sir.

Q. 10. You know the officers and agents of the defendant The Home Land and Cattle Company, the defendant in this suit? A. Yes, sir.

Q. 11. You know the officers and agents of the defendant the National Bank of Commerce of St. Louis?

A. Have met the cashier.

Q. 12. Mr. Van Blarcum? A. Yes, sir.

Q. 13. When did you become acquainted with Mr. Van Blarcum? A. In 1897, August, I think.

Q. 14. In connection with this contract which you made with The Home Land and Cattle Company?

A. Yes, sir.

Q. 15. Never had known him before? A. No, sir.

Q. 16. Nor the bank? A. No, sir.

Q. 17. What officers of The Home Land and Cattle Company are you acquainted with?

A. I am acquainted with the president.

Q. 18. Who is the president.

A. Mr. W. F. Niedringhaus.

Q. 19. When did you become acquainted with him?

A. I met him in May, 1897—in Chicago.

Q. 20. That was your first acquaintance with him?

A. Yes, sir.

Q. 21. What other officers or parties connected with the company do you know?

A. I know Mr. Albert W. Niedringhaus.

Q. 22. That is the young man that had the power of attorney for the delivery of the cattle?

A. Yes, sir.

Q. 23. When did you become acquainted with him?

A. About the last of May, or some time in June, 1897.

Q. 24. Where? A. At Oswego.

Q. 25. What other parties belonging to this company, The Home Land and Cattle Company, did you know?

A. I knew Mr. Blackman.

Q. 26. Loss Blackman? A. Yes, sir.

Q. 27. What was his office or function connected with the company, Mr. McNamara?

A. He was supposed to be the general manager for the company.

Q. 28. And what did his duties appear to be on the ranch, where the stock of the company was?

A. He gave orders to the different men who were gathering the stock at first, and sent them out again gathering.

Q. 29. Who was the active man in charge of the company's business on the ranch? A. Loss Blackman.

Q. 30. Did you ever meet Mr. H. L. Niedringhaus?

A. Yes, sir.

Q. 31. When did you become acquainted with him?

A. I had known him for seven or eight years.

Q. 32. Were you down at Miles City when the first conversation about the purchase of these cattle came up?

A. Yes, sir.

Q. 33. With whom was the first conversation had?

A. Joseph Rosenbaum was the man I was talking to.

Q. 34. You, yourself, didn't have any talk with Mr. W. F. Niedringhaus? A. No, sir.

Q. 35. When did you first participate in any negotiations concerning the purchase of these cattle with Mr. W. F. Niedringhaus? A. In May, 1897.

Q. 36. At or about the time this contract was entered into? A. Yes, sir.

Q. 37. Where?

A. In Mr. Rosenbaum's office at the Union Stockyards in Chicago.

Q. 38. That is the office of Rosenbaum Brothers at Chicago, you say? A. Yes, sir.

Q. 39. Who was there representing The Home Land and Cattle Company?

A. Mr. W. F. Niedringhaus, the president of the company.

Q. 40. Anyone else?

A. Yes, I think his son was with him.

Q. 41. Do you know his name?

A. I think it is George.

Q. 42. The one that witnessed this contract?

A. Yes.

Q. 43. Was the meeting there accidental?

A. No, sir; we met there by appointment.

Q. 44. You didn't meet before? A. No, sir.

Q. 45. The appointment was made by correspondence?

A. Yes, sir.

Q. 46. Who arrived at the office first?

A. The Niedringhauses were there first.

Q. 47. How did you happen to meet them there—
were they there when you got there?

A. Yes, they were there when Mr. Marlow and I got
there.

Q. 48. About what time was it when they met you
there?

A. I should think it was about ten o'clock.

Q. 49. What, if any, effect did the promise of 9,000
head of these steers, or the payment in the alternative of
\$20 per head for any shortage in this number of steers
and spayed heifers, have upon the fixing of the price
named in the contract.

By Mr. CULLEN.—To which we object, for the reason
that the effect that it had upon the contract is immate-
rial and irrelevant.

(Sustained.)

A. Well, I told Mr.—

By Mr. CULLEN.—Never mind what you told Mr.—

Q. 50. First answer what effect it had, Mr. McNamara, upon the fixing of the price, if any.

A. Well, a guaranty of 9,000 head of steers in a herd of cattle would make it worth more than if the 9,000 steers were not there.

Q. 51. Was the matter discussed and its effect considered in the fixing of the price?

A. Yes, sir, it was.

Q. 52. State what that discussion was.

By Mr. CULLEN.—To which we object, for the reason that it is immaterial. The result of the negotiation was a written contract, and the contract is the best evidence.

(Sustained.)

By the MASTER.—Ruling reserved.

Q. 53. What effect did this guaranty of the 9,000 head or the promise to pay \$20 per head in the absence of that number have in fixing the price?

A. We agreed to take the cattle at the price named.

The sum of \$25 per head if they would guarantee having 9,000 head of steers three years old and upwards and spayed heifers of that age, or we agreed to take the cattle without this guarantee of any number of steers at \$23 per head.

Q. 54. It represented, then, the difference between the \$23 and the \$25 per head? A. Yes, sir.

Q. 55. Do you remember who drew the contract?

A. Mr. Marlow and Mr. Niedringhaus fixed up the

writing of the contract and agreed on it; I don't remember who did draw it.

Q. 56. No attorney fixed it up?

A. No, sir; my recollection is there was no attorney.

Q. 57. Did you look at the contract to see when it was made?

A. It was made on the same day it was signed.

Q. 58. Do you remember if that was the same day you met in Chicago? A. Yes, sir; the same day.

Q. 59. Everything was closed up in one day?

A. Yes, sir; everything was wound up in one day.

Q. 60. *When* did you and Mr. Marlow go when the contract was completed?

A. Went to the Auditorium Annex Hotel.

Q. 61. And when did you leave the city?

A. I think the following day.

Q. 62. Did you see the Niedringhauses there?

A. Yes, sir; had dinner with them in the evening at the hotel.

Q. 63. Any understanding as to the commencement of deliveries, or didn't you talk about it?

A. No, they didn't know exactly when they would commence; they told us they would notify us of that later.

Q. 64. Did they notify you? A. Yes, sir.

Q. 65. When did they commence?

A. Commenced in June.

Q. 66. Did they commence in accordance with the notification? A. Yes, sir.

Q. 67. Do you state from memory as to the dates of the various deliveries?

A. No, we didn't get any cattle in June; I was mistaken about that; it was July when the deliveries commenced.

Q. 68. What time was it in July when the deliveries first commenced?

A. It was in the fore part of July; I don't remember the date.

Q. 69. How were these deliveries made as to being in trainload lots or substantially in trainload lots?

A. Supposed to be in trainload lots.

Q. 70. How many trainloads would you get in a single delivery?

A. Sometimes one and sometimes as high as six or eight.

Q. 71. What was the custom of turning over all of the cattle that had been gathered at one delivery?

A. For instance, they would commence to-day and turn over the delivery and follow it up the next day until they had turned over all they had at that time.

Q. 72. Was that the custom that was followed all the way through? A. Yes, sir; it was.

Q. 73. How did the deliveries run as to shipping, as a rule—a single trainload lot or several trainloads?

A. Well, there was generally three or four trains of cattle at every delivery, and at one time I remember of receiving seven trains of cattle in one delivery, shipping six to Chicago and one to Big Sandy.

Q. 74. Was there any system by which you selected these cattle from the herd as to shipping them to market or sending them to the ranch at Big Sandy?

A. Yes, sir.

Q. 75. What was that custom?

A. We shipped all the steers that we had fit for beef to Chicago and all the dry cows. In fact, all the cattle that were fit for beef we shipped to Chicago, and all the others we shipped to Big Sandy.

Q. 76. Do you know the total number of stock that you shipped to Chicago out of that herd?

A. No, sir; I don't without looking up the books.

Q. 77. Can you look at the books and tell?

A. Yes, sir.

Cross-Examination.

(By Mr. CULLEN.)

Q. 1. Mr. McNamara did you make that memorandum which you have in your hands there or was it made under your direction?

A. Well, it was made by our bookkeeper.

Q. 2. You were not present when it was made?

A. No, sir; I was not.

By Mr. CULLEN.—I object to that for the reason that it is not shown that the witness either made it himself or was present when it was made or directed it to be

(By Mr. WALLACE.)

Q. 78. Is it a part of the regular bookkeeping or results of your business, Mr. McNamara?

A. Yes, sir; it is.

Q. 79. Is it the custom in your business to keep such a statement as a part of your books and business accounts? A. Yes, sir.

Q. 80. Is that the statement that was so kept?

A. Yes, sir.

Q. 81. Now, will you kindly turn to the point in the statement which shows the number of cattle shipped to Chicago?

By Mr. CULLEN.—We object to the witness using the memorandum which he holds in his hands, for the reason that it does not appear that it was made by himself or under his direction or that he knows it to be correct or that he ever examined it before.

(Overruled.)

By Mr. WALLACE.—It does appear that it is a regular part of the business books of account, and that they kept these statements as a part of their bookkeeping system of accounts and the paper as such is admissible in evidence we contend; it is a book of original entry.

By the MASTER.—Ruling reserved.

Q. 82. Does that show the steers?

A. I guess it does, but I cannot see it; I know from memory pretty near what we shipped.

Q. 83. Now, what was the approximate number which you said was shipped from your memory, steers and dry cows—everything that went as beef to Chicago?

A. Between eight and nine thousand head.

Q. 84. Well, going back to the matter of these deliveries that we were speaking of, under this contract, was there or was there not any uniform rule followed in delivering and receiving these cattle as to the time when the payments would be made and the manner of payment?

By Mr. CULLEN.—We object to that for the reason that the time and manner of payments is provided for in the contract and cannot be varied by custom.

(Overruled.)

By the MASTER.—Ruling reserved.

A. Why, the cattle were always paid for immediately after finishing the end of one delivery, or as soon as I got back to Big Sandy there was a draft sent to cover that delivery—all that was received on one delivery.

Q. 85. Covered all that was received?

A. Yes, sir.

Q. 86. When you say a draft to cover that amount, what do you mean by the amount of the draft?

A. I mean \$25.00 a head for every head of cattle received.

Q. 87. The total required to make the total price per head for all the cattle you had received at previous deliveries? A. Yes, sir.

Q. 88. When you speak of the delivery in this sense are you referring to a single train load or all turned over at any one time?

A. All turned over at any one time.

Q. 89. Was there ever a time before October 21st and 22d when there was any request made by the persons delivering the cattle under the contract for the payment of any of the purchase price at the end of a single trainload if there were more than trainload lots there for delivery?

By Mr. CULLEN.—We object to the question because it is incompetent, irrelevant, and immaterial.

(Overruled.)

A. No, there never was any such demand made.

Q. 90. When was the first demand, if any, made in the midst of a delivery?

A. About October 20th, 1897.

Q. 91. At the time of what you called the final delivery? A. At the time of the final delivery.

Q. 92. Had you at any time before October 21st had any talk with any of the Niedringhauses, the representatives of the defendant, concerning the probable amount of this steer shortage under the contract?

A. Yes, sir.

Q. 93. When and where was that first talk and with whom?

A. It was with Mr. W. F. Niedringhaus, the president of the company, and about thirty steps north of the trading store at Oswego.

Q. 94. And when?

A. It was about the 1st of October. About that time; I wouldn't be positive as to the date.

Q. 95. Can you fix it with reference to any delivery of cattle under the contract?

A. It was in the midst of a delivery of cattle next to the last delivery that we got.

Q. 96. This W. F. Niedringhaus that you speak of was the president of the Cattle Company? A. Yes, sir.

Q. 97. Who, for the defendants, had been present supervising the delivery of all the cattle under this contract at deliveries made prior to and inclusive of the time of this talk with W. F. Niedringhaus?

A. W. F. Niedringhaus.

Q. 98. Did he look after the deliveries in person?

A. Yes, Mr. W. F. Niedringhaus looked after the deliveries in person.

Q. 99. What was he doing there at the time of this talk?

A. He was there on that business, to turn over or deliver all cattle that we had been taking at that time.

Q. 100. When, if you know, did the National Bank of Commerce of St. Louis, become connected with the contract, or did you have notice?

A. Yes, sir; we had notice of that shortly after making the contract.

Q. 101. Was that notice received in the form of a letter?

A. Yes, sir; it was received in the form of a letter from Mr. Van Blarcum and Mr. Niedringhaus.

Q. 102. Then Mr. W. F. Niedringhaus was representing the parties concerned in the delivery of the cattle at all the deliveries that were made except the last?

A. I wouldn't say all; he might have been there on some other delivery.

Q. 102. Have in your memory any other delivery when he was not there?

A. I think he was there on every delivery except one delivery.

Q. 104. But you cannot locate it?

A. No, sir; I am not positive.

Q. 105. So far as you know he was the man that represented them on all deliveries?

A. Yes, sir; he was the man that represented them to turn the cattle over.

Q. 106. Now, coming down to this conversation about the shortage at Oswego, who was present at that time?

A. Mr. Marlow was about ten feet away from me; he was the closest man to me.

Q. 107. Now, tell what the talk was between yourself and Mr. Niedringhaus?

A. Mr. Marlow and myself were walking back of the store—probably twenty or thirty steps back of the store—and Mr. W. F. Niedringhaus called to me and I went over to him and he said, isn't there some way we can settle on this shortage and stop where we are. I told him I didn't know whether we could or not, and asked him what he wanted to do about it—asked him how much he thought he would be short. He said he thought he would be short about a thousand head. I told him I thought he would certainly be short two thousand head; to which he replied that he didn't think they would. He said he would give us twenty thousand dollars if we would stop right where we were and settle the thing up. I told him no, that I couldn't take his proposition, but

I told him that we would take thirty thousand dollars, and he keep his horses. To this he replied that he would let me know in the morning. The following morning he came over to Oswego again and told me that he had made up his mind he wouldn't accept my proposition.

Q. 108. Did you have any talk with him at or about that time concerning when they would be through the delivery of the cattle?

A. Yes, sir; that same day.

Q. 109. What was that talk?

A. He told me that he would make the final delivery about the 14th of October.

Q. 110. What else did he say?

A. He asked me if I would take a certain number of dries that were thin in flesh and not fit to ship to Chicago on that delivery.

Q. 110. Had these steers been offered you before?

A. Yes, sir; according to the terms of the contract we were not compelled to take any steers of three years and up until such time as they were beef. This was a bunch of cattle that was held up five or six miles from Oswego.

Q. 111. Why had they been held there?

A. Because they were not in a fit condition to go to Chicago.

Q. 112. Who had determined that? A. I had.

Q. 113. You had rejected them from time to time before? A. Yes, sir.

Q. 114. And it was these cattle he was asking you about—these steers and spayed heifers?

A. Yes, sir; on this final delivery on the 14th of October.

Q. 115. What did you say to him?

A. Told him I would take everything.

Q. 116. Did you take them? A. Yes, sir.

Q. 117. Was that delivery made as stated by him on the 14th? A. No, sir.

Q. 118. Did you go down there on the 14th expecting to receive them? A. Yes, sir.

Q. 119. Had you received any notification between the interval this took place on the 2d and the 14th that they wouldn't deliver the cattle? A. No, sir.

Q. 120. When did you get the first notification that they wouldn't deliver?

A. When we got to Oswego on that day.

Q. 121. Who was with you? A. Mr. Marlow.

Q. 122. What, if any, talk did you have with Mr. Blackmon concerning the delivery on the 14th?

A. I asked him if he was going to turn over to-day; he replied that he hadn't any instructions from Mr. Niedringhaus as to when he would turn over. I asked him how many cattle he had and he told me about 1,400 head, and said that he was through gathering for the season, but had no instructions to turn these cattle over and couldn't turn them over until Mr. Niedringhaus gave him instructions to do so. He said he expected Mr. H. L. Niedringhaus there that evening.

Q. 123. Did you understand where these cattle were that he said he had? A. Yes, sir.

Q. 124. Where were they?

A. They were about four or five miles north of Oswego.

Q. 125. Being held by him?

A. Being held by one of his men.

Q. 126. Do you know Caldwell?

A. Yes, sir; they were being held by Caldwell.

Q. 127. Do you remember who was present in this talk with Mr. Blackmon?

A. I don't remember anybody in particular; there was several people around there. Mr. Marlow, I think, was with me when I was talking with him.

Q. 128. Was Mr. W. F. Niedringhaus there at that time? A. No, sir.

Q. 129. Was there anybody except Mr. Blackmon representing the company at that time?

A. No, sir; there was nobody except Mr. Blackmon and Mr. Ab. Niedringhaus.

Q. 130. Was Mr. Ab. Niedringhaus taking any part in this conversation? A. No, I don't think he was.

Q. 131. Was this the day when he was intoxicated and made the remark Mr. Marlow spoke about?

A. It was the day he was intoxicated.

Q. 132. I wish you would state to the stenographer what that remark was; I don't think it was put in Mr. Marlow's testimony.

By Mr. CULLEN.—We object to it for the reason that it isn't shown that Mr. Ab. Niedringhaus had anything to do with these cattle at that time or was authorized to make any assertions with reference to them.

(Sustained.)

By the MASTER.—Ruling reserved.

Q. 133. You may state, Mr. McNamara, what he said?

A. He said—he was very drunk—he drove up there in a buggy and took out a bottle of whisky and asked me to take a drink of it, and I refused, and he held his bottle up and said it would be a damned cold day when a Niedringhaus got left; that is about the exact words that he said.

Q. 134. Did these remarks make any impression upon your mind in connection with the cattle delivery?

By Mr. CULLEN.—We object to any impression that was made on his mind or anything with reference to that.

(Sustained.)

By the MASTER.—Ruling reserved.

A. Yes, it did; I couldn't understand why he should make the remark. Mr. Marlow and I talked about it afterwards.

Q. 135. Did you make any effort to find out why the cattle were not delivered as they seemed to be there ready to be delivered? A. Yes, sir.

Q. 136. Were you able to? A. No, I wasn't.

Q. 137. Had any of the Niedringhauses come in on that day?

A. Yes, sir; Mr. H. L. Niedringhaus came in on that day.

Q. 138. When did the train arrive?

A. It arrived there about dusk; I think about six o'clock.

Q. 139. You had been in Oswego about how long on that day?

A. Got in there about eleven o'clock that same day.

Q. 140. Had you been able to do anything to get any deliveries or accomplish anything on the errand on which you came? A. No, sir.

Q. 141. When did Mr. Niedringhaus—where did you meet Mr. H. L. Niedringhaus?

A. Met him at Oswego at the station.

Q. 142. As he was getting off the train?

A. Yes, sir.

Q. 143. Where were you and Mr. Marlow going?

A. If he wasn't going to make that delivery, we were going on the railroad back to Big Sandy.

Q. 144. What transpired there?

A. I asked Mr. Niedringhaus when he was going to be ready to turn over, and he said maybe not for three or four days—maybe not for ten. I says all right, I will go home; he said he might come up to see me. The train only stopped there a few minutes; it was only a flag station.

Q. 145. Was that all that was said?

A. Yes, sir.

Q. 146. Do you remember making any inquiries as to why he wouldn't turn over? A. No, sir.

Q. 147. He said he wasn't ready to?

A. Yes, sir; he said he wasn't ready to turn over at that time, but probably would be in a week or ten days.

Q. 148. Did you receive any communication from

these people between the 14th and the 21st day of October, when you came down there? A. Yes, sir.

Q. 149. Is that Exhibit "B" and "C" that is introduced here?

(Witness handed papers, being telegram and letter marked by the master Exhibits "B" and "C," respectively.)

A. Received a letter and a telegram, I think: that is the letter and the telegram that were received.

Q. 150. Is the A. W. Niedringhaus named in the letter the one who has made this statement when intoxicated on the 14th? A. Yes, sir; the identical man.

Q. 151. And were these cattle that were here on the 14th, the same cattle that were covered in the letter Exhibit "B"? A. Yes, sir; the same cattle.

Q. 152. When did you next go down to Oswego after the 14th? A. About the 21st.

Q. 153. Both of you went down there together?

A. Yes, sir; Mr. Marlow and myself.

Q. 154. You have an attorney with you?

A. Yes, we had an attorney with us as far as Glasgow.

Q. 155. That was Mr. McIntire? A. Yes, sir.

Q. 156. Take any money with you?

A. Yes, sir.

Q. 157. What kind of money? A. Currency.

Q. 158. Legal tender? A. Legal tender.

Q. 159. To what amount?

A. Ten thousand dollars.

Q. 160. What time of the day did you get into the station of Oswego on your next visit about the 21st?

A. Well, it was between 11 and 12 o'clock; about noon.

Q. 161. Have any train or trains there to receive cattle?

A. Yes, sir; there was a train standing there when we got there.

Q. 162. Where was this herd at this time?

A. It was about three miles north of Oswego.

Q. 163. Whom did you meet there at that time representing the defendants for the purposes of delivery?

A. I met Mr. Blackmon and Mr. Albert Niedringhaus and a Mr. Sharp.

Q. 164. When did Mr. Sharp first begin to take any hand in the proceedings?

A. At the time that we made them a tender of the money that we would owe them if they turned over all the cattle and horses to us.

Q. 165. This was after you had gotten all the cattle out of the last bunch that they were willing to turn over to you?

A. Yes, sir.

Q. 166. Who officiated in the matter down to that time or acted for the company up to that time?

A. On this particular bunch of cattle?

Q. 167. Yes, sir. A. Mr. A. W. Niedringhaus.

Q. 168. Now, will you state in your own way what transpired in the delivery of these cattle after you got down there to Oswego?

A. As soon as I got to Oswego, Albert Niedringhaus came to me and asked me how many cattle I wanted to receive that day, and I told him we would receive all we could get—that trainload anyway, and he asked me how many cattle I intended to load on the train; I told him about 600; he gave us—he turned to Mr. Blackmon and told Mr. Blackmon to get the cattle. They went out after the cattle and my man went with them—one of them.

Q. 169. Who was your man?

A. Herman Knoell.

Q. 170. Anything said about the class of the cattle?

A. They were all to be steers and spayed heifers or dry cattle.

Q. 171. What next transpired under your observation?

A. They went out and brought the cattle in and we loaded them.

Q. 172. Where were they brought to?

A. Into the station at Oswego.

Q. 173. How many?

A. Six hundred and twenty-five or six head.

Q. 174. Who participated in the loading of this herd of cattle; people representing The Home Land and Cattle Company?

A. Mr. Marlow and myself and Mr. Blackmon and Mr. Niedringhaus.

Q. 175. When was the loading concluded?

A. The loading was concluded at just about dusk.

Q. 176. When did the train leave?

A. Immediately after it was loaded.

Q. 177. Was there anything said that day concerning payment for this trainload of cattle?

A. No, sir; there was not.

Q. 178. Nothing whatever said to you or in your presence? A. No, sir.

Q. 179. Where did you go after completing the loading of the train? A. I went up to our tent.

Q. 180. Who went with you? A. Mr. Marlow.

Q. 181. Where did you take supper?

A. In our cook tent.

Q. 182. Who took supper with you?

A. Albert Niedringhaus.

Q. 183. When did Mr. Niedringhaus leave you that evening?

A. I think about half-past seven o'clock.

Q. 184. Was there anything said about payment while you were at supper?

A. No, sir; I gave him a receipt for that number of cattle as I always had done.

Q. 185. Had it been your custom to give a receipt for each trainload?

A. Gave a receipt for each trainload or for each delivery of cattle.

Q. 186. Was there any departure from the custom when it came to giving receipts for the cattle delivered?

By Mr. CULLEN.—To which we object, for the reason that custom cannot modify the terms of the contract.

(Overruled.)

By the MASTER.—Ruling reserved.

A. No, sir.

Q. 187. Did you see Mr. Niedringhaus any more that night after he left you—that night after supper?

A. I don't remember.

Q. 188. Have no recollection of it?

A. No, sir; I have not.

Q. 189. Did you see Blackmon any more that night?

A. After that time Mr. Blackmon had gone home, I think.

Q. 190. Was there anything said about the method of delivery the next day—what was to be delivered?

A. Yes, sir; they were to turn over the balance.

Q. 191. What was said about it?

A. It was talked over that day; Mr. Niedringhaus came to me and asked me when we wanted to get the cattle, and I told him I wanted to get them right away. I wanted a bunch for Fort Peck.

Q. 192. Was there anything said about the amount you wanted?

A. I told him I wanted about 300 head of steers and a few cows.

Q. 193. Was anything said as to where they were to be cut out?

A. Yes, they were to be turned over on the prairie.

Q. 194. Was anything said as to where the balance were to be turned over?

A. Yes, sir; the balance were to be brought to the stockyards and turned over.

Q. 195. So that evening it was talked over and understood where the balance was to be delivered the next day? A. Yes, sir; it was.

Q. 196. Was anything said that evening concerning the turning over of the horses?

A. I don't remember; I think there was, though.

Q. 197. Still you are not sure upon that point?

A. No, I am not.

Q. 198. Now, the following day what transpired as between yourself and Mr. Niedringhaus and Mr. Blackmon? When did you first get started and what was done under your observation?

A. When we got out to the herd in the morning, Mr. Blackmon and my foreman had the cattle all cut out.

Q. 199. That is, these cattle for the Fort Peck Agency? A. Yes, sir.

Q. 200. What happened after you got out to the herd?

A. I counted the cattle and started them off for the agency.

Q. 201. And then what happened?

A. And then Mr. Blackmon gave his men orders to take the others into the Oswego stockyards which they started to do at that time.

Q. 202. Was there anything said at the time these cattle started off for the Fort Peck Agency about a demand for payment? A. No, sir.

Q. 203. Or anything said by Mr. Niedringhaus or Mr. Blackmon? A. No, sir.

Q. 204. When was the first time in the matter of this delivery that the question of payment was broached by

Niedringhaus or Blackmon or anybody representing the defendant?

A. It was about 10 o'clock in the day, about an hour after those cattle had been turned over to us for the Fort Peck Agency.

Q. 205. Now, what had transpired on this inventory here? You say Blackmon directed that the cattle be brought down to the stockyards?

A. Well, they were bringing the cattle down on their way.

Q. 206. Had they reached the stockyards at the end of the hour?

A. No, they had got very close though.

Q. 207. Now, tell what transpired when the cattle got this close to the yards?

A. Mr. A. W. Niedringhaus came to me—

Q. 208. Where were you?

A. I was in my cook tent.

Q. 209. Who was with you?

A. I think Mr. Marlow was but I wouldn't be positive.

Q. 210. Anybody else around?

A. Yes, the cook was there and my foreman.

Q. 211. Who was that cook?

A. His name was French, I think.

Q. 212. Herman Knoell your foreman?

A. Yes, sir.

Q. 213. Where is Herman Knoell?

A. At Big Sandy.

Q. 214. Where is French?

A. He is at Big Sandy, too.

Q. 215. Who came with Niedringhaus, if anyone came with him? A. No, I think he came alone.

Q. 216. Now, you may state what took place in the tent.

A. When he came into the tent he says, "Mac, let's settle up on these cattle, that have been received"; I sat down and gave him a receipt for 308 or 310 head of cattle, and I didn't pay any more attention to him. "Well," he says, "will you give me a draft?" and I says, "Might just as well make a settlement now," and I says, "I will turn you over to Mr. Marlow and he will do the figuring on it"; so they went to work figuring and found there was 457 head of cattle out, not including the horses.

Q. 217. Where did you count that number of cattle still out?

A. We included that in the part of the settlement we undertook to make.

Q. 218. Where did you get that number?

A. Well, Mr. Blackmon counted them.

Q. 219. And when you say the cattle still out, what do you mean? A. The 457 head.

Q. 220. They were all that remained of this last lot, was it, that you were then engaged in receiving?

A. Yes, sir.

Q. 221. Now, go ahead; you say you figured out 457 head of cattle and the horses; now what transpired between Mr. Marlow and Mr. Niedringhaus?

A. Mr. Marlow figured out what they would have

due them, leaving off the shortage on the steers—some 1,900 head—and made them a tender of the difference; it was something like nine thousand dollars.

Q. 222. How was the tender made?

A. It was made by handing the money over to Mr. Niedringhaus.

Q. 223. Before you?

A. Yes, sir; he was asked to count it, if I remember right.

Q. 224. Did he count it? A. No, sir.

Q. 225. What was this money that was turned over?

A. They were large bills principally, \$100 bills and \$50 bills.

Q. 226. Well, what were they with reference to this legal tender money that you brought down—was it that money or part of that money?

A. Well, the money that was offered to Mr. Niedringhaus?

Q. 227. Yes.

A. Why, I don't think I understand you.

Q. 228. I want to know whether the money that Marlow offered to Niedringhaus was part of the legal tender money that you say he had brought down with him to Oswego, or whether it was some different money.

A. No, sir; it was the same money that he had brought down.

Q. 229. Did Marlow say anything about the amount of money that was being offered him?

A. Yes, he told them what it was.

Q. 230. Did Mr. Niedringhaus count it?

A. No, he refused to count it.

Q. 231. Did Mr. Niedringhaus make any objection to the character of the money that was offered?

A. No, sir.

Q. 232. What did he say when the money was offered?

A. He said he didn't have any authority to make any kind of a settlement. He said all the authority he had was to receive pay for the cattle.

Q. 233. How was this shortage arrived at?

A. Well, we had—

Q. 234. Who arrived at it, Marlow or you—who figured it out?

A. Mr. Marlow figured it out; I knew of my own knowledge that it was about 1,900 head.

Q. 235. Well, what transpired after he said that he never had any authority except to collect pay for those cattle and couldn't adjust that shortage?

A. I don't remember.

Q. 236. What did Marlow say to that?

A. I don't remember.

Q. 237. Did anything further happen there that you recall?

A. Yes, sir; Mr. Sharp came up there and asked if we would take the horses, and wanted to know if we would take the horses.

Q. 238. How did Sharp happen to come?

A. I think Mr. Niedringhaus went after him.

Q. 239. Did Niedringhaus return with Mr. Sharp?

A. Yes, sir.

Q. 240. How long was this after the tender of the money?

A. I think Sharp was there when the tender was made.

Q. 241. When the first tender was made?

A. I think so.

Q. 242. Are you sure of that? A. No, sir.

Q. 243. Are you sure a tender of the money was made in Sharp's presence? A. Yes, sir.

Q. 244. But you cannot say whether this was the first or second tender?

A. No, sir; I think once when he was alone.

Q. 245. Was the same money tendered both times?

A. Yes, sir.

Q. 246. Was any objection made by Mr. Sharp as to the kind of money that was offered? A. No, sir.

Q. 247. What did Sharp say when he came up there and the tender was made to him?

A. He said he was there—admitted he was there representing these people and wouldn't agree to any such settlement as we wanted to make. He said he knew nothing about the terms of the contract or adjusting it.

Q. 248. What was the amount of money tendered with reference to the balance you had figured to be due in adjusting this steer shortage—how did it compare with the balance?

A. Well, that was the exact amount, as near as we could get at it, leaving out the steer cattle we didn't have.

Q. 249. Was there any objection made to the settlement on the basis of Marlow's figures? A. No, sir.

Q. 250. The objection was that they were not authorized to adjust the shortage?

A. Yes, sir; exactly.

Q. 251. Now, what transpired after Sharp had announced himself—what became of your four people in the tent?

A. Mr. Sharp asked us if we would receive the horses that day. I answered him that we would, and so he immediately sent his men after the horses.

Q. 252. What, if anything, had been said about turning over this 457 head of cattle?

A. They stopped them right there.

Q. 253. Who ordered them stopped?

A. I think Mr. Sharp did.

Q. 254. And his orders were obeyed?

A. Yes, sir.

Q. 255. Now, did you people make any demand for the 457 head? A. Yes, sir.

Q. 256. Who made it? A. I did.

Q. 257. Did they comply with it? A. No, sir.

Q. 258. What was your demand?

A. That they put the cattle into the corral and count them out to us.

Q. 259. And they wouldn't do it? A. No, sir.

Q. 260. And the cattle were stopped on the prairie?

A. Yes, sir.

Q. 261. Then what transpired?

A. They brought the horses there from the south side of the Missouri river and put them in the corral and told me to check up what I wanted.

Q. 262. Who told you to go in and check them out?

A. Well, I think Mr. A. W. Niedringhaus told me and Mr. Sharp too.

Q. 263. Did you do so?

A. Yes, sir; I went in and selected five hundred head.

Q. 264. Was the bunch of 700 there? A. No, sir.

Q. 265. How many were there? A. 583 head.

Q. 266. Did you count them? A. Yes, sir.

Q. 267. How many horses did you take out of that bunch? A. 500 head.

Q. 268. Where were the 457 head of cattle at this time?

A. Oh, a little way from the stockyards.

Q. 269. Did they afterwards bring them in?

A. No, sir.

Q. 270. Or attempt to deliver them to you or any part of them to you in any manner? A. No, sir.

Q. 271. What became of the cattle that day?

A. They were held all that day by their men.

Q. 272. Were you ready to receive the cattle that day? A. Yes, sir.

Q. 273. Now, proceed with the horse business after you had counted out this 500 head—what transpired?

A. Then we still offered—put them in separate corrals, this 500 head, and figured in the 457 head of cattle that were out a mile or a mile and a half from the track and went through the same tender that we had before in the tent.

Q. 274. Made another tender?

A. Made another tender.

Q. 275. After these horses had been cut out?

A. Yes, sir.

Q. 276. Offering to settle on the same basis?

A. Yes, sir.

Q. 277. Who made the tender?

A. Mr. Marlow.

Q. 278. To whom?

A. To Sharp and Mr. Niedringhaus.

Q. 279. Was it accepted or refused?

A. It was refused.

Q. 280. What then became of the horses?

A. The horses were immediately after that taken out of the corral, driven south again, I think, across the Missouri river.

Q. 281. Did you receive them?

A. They wouldn't turn them over to me; they took them away.

Q. 282. Did they say why they wouldn't turn them over?

A. Claimed I wouldn't pay them for them.

Q. 283. What did they demand?

A. They demanded that I pay for them right there.

Q. 284. Did they demand payment for them before they would turn them over?

A. I don't remember as to that.

Q. 285. Well, had they been turned over when they demanded payment?

A. Yes, sir; they counted them out to us.

Q. 286. Well, were they in your charge?

A. No, they were supposed to be in my charge, but I ordered them not to turn them out of the corral.

Q. 287. Who had handled the horses as they were turned into the corral?

A. Mr. Blackmon.

Q. 288. Their man?

A. Their man.

Q. 289. Had their man ever given up charge of them to your men?

A. Well, they counted them out; after I took out 500 head I supposed the horses I had were, therefore, our horses.

Q. 290. Well, were your men in charge of them or were their men in charge of them?

A. I guess I never was in charge of them.

Q. 291. Well, had they ever surrendered the control of the horses to you?

A. No, sir; they never had.

Q. 292. And while the horses were in the corral they made this demand upon you for a money payment?

A. Yes, sir.

Q. 293. What amount of money did they demand, how much per head?

A. \$20 per head, the contract price.

Q. 294. And upon your refusing to pay them this price what did they do with the horses?

A. Ordered them turned out of the corral.

Q. 295. You forbid that?

A. Yes, sir.

Q. 296. They paid no attention to you?

A. No, sir.

Q. 297. Who gave this order directing the horses to be turned out of the corral?

A. Niedringhaus, Sharp and Blackmon.

Q. 298. Were they turned out? A. Yes, sir.

Q. 299. By whom? A. By their men.

Q. 300. Did their horses remain?

A. Yes, sir.

Q. 301. Then what was done with the other horses?

A. They drove them south of the Missouri river.

Q. 302. All of them?

A. No, sir; I think they left 80 or 100 head.

Q. 303. Who took the horses, the 80 or 100 head?

A. Mr. Caldwell.

Q. 304. Their foreman? A. Yes, sir.

Q. 305. Any division in county lines at that point on the river?

A. I don't know whether there is or not. Don't know where the line is; I think the river is the line.

Q. 306. If the river was the line and these horses were across the river, they were on the south side of the river? A. Yes, sir.

Q. 307. What time in the afternoon was that done?

A. That was in the afternoon; oh, it must have been three or four o'clock.

Q. 308. Was this the 500 head or did they mix them up? A. Mixed them all up.

Q. 309. And out of the mix up they took this 80 or 100 head?

A. Mr. Caldwell took out the identical horses.

Q. 310. Did they take them out after the 80 or 100 head were turned out?

A. I don't know; I suppose it was after.

Q. 311. How was this 583 head made up? What did they do to get that number, to increase the number?

A. Turned all the horses they owned in there.

Q. 312. Left Caldwell and his crew without any horses at all? A. They had a few private horses.

Q. 313. But no company horses?

A. Yes, all the company horses were in there—all supposed to be.

Q. 314. What did Blackmon or the others do that were riding company horses?

A. Took the saddles off and turned them into the corral.

Q. 315. Everything that was supposed to belong to the company put into the corral? A. Yes, sir.

Q. 316. Were the horses ever brought back from across the river while you were there? A. No, sir.

Q. 317. What transpired in connection with the horses or cattle the following day?

A. Mr. Marlow and I left there immediately after they refused to turn the cattle over to us.

(It is admitted by the parties that the remaining herd of 457 head of cattle taken by the receiver appointed in that action were removed to Big Sandy and sold to McNamara and Marlow.)

Q. 318. Now, when the receiver got there what stock did he find? A. 457 head of cattle.

Q. 319. The horses were not there?

A. No, sir; they were across the river.

Q. 320. Yes, but none of the horses that you had

counted out, the 500 head, were there, so far as you know? A. I don't know.

Q. 321. Did you ever come back to Oswego after that in connection with this business? A. Yes, sir.

Q. 322. Did you meet any of these people there?

A. Yes, sir.

Q. 323. Have any talk with them?

A. Only in a general way.

Q. 324. Who did you meet?

A. Mr. Niedringhaus and Mr. Sharp.

Q. 325. What date?

A. Must have been about the 22d, I guess.

Q. 326. Anything of any importance transpire?

A. No, sir; I had no talk with them of any consequence.

Q. 327. How long have you been in the cattle business, Mr. McNamara, been connected with it?

A. Ten or twelve years.

Q. 328. You have had actual contact with the business in all this time? A. Yes, sir.

Q. 329. You have been among the herd?

A. Yes, sir.

Q. 330. Observed and conducted the business in all its practical branches? A. Yes, sir.

Q. 331. Are you able to tell us, as a cowman, when a round-up of a large band of cattle is closed up—when they finish up? A. Why certainly.

Q. 332. What is the process they go through, as to their wagons and supplies and men?

A. Always discharge their men, and pull their wagons in home, and put them away.

Q. 333. What do they do with their supplies?

A. Generally have them eaten up.

Q. 334. If they are not, what do they do with them?

A. I don't understand you?

Q. 334. Throw them away? A. No, sir.

Q. 335. Well, what do they do with them?

A. Generally use them.

Q. 336. Wagons cleaned out?

A. Yes, the wagons are usually cleaned out, and they always put them away, wherever they are going to winter.

Q. 337. What do they do with the stoves?

A. Put them away.

Q. 338. Is it generally customary, after having put them away, the wagons, outfits, stoves, etc., to bring them out again? A. No, sir.

Q. 339. Are you familiar with the range down around Oswego?

A. I have been over the range there somewhat.

Q. 340. How much of a round-up could be made with the horses that Caldwell had from October 21st to November 1st?

A. Couldn't do much; I wouldn't think they could do anything.

Q. 341. What kind of a round-up could they do with those remaining, the screenings of the herd?

A. I don't think they could do anything with the horses that were left. At that time of the year they were very thin.

Q. 342. Had you seen other outfits before; do you know how many wagons they generally take on a general round-up? A. Five or six.

Q. 343. Do you know how many they had left, after what you call the final delivery, after it had taken place?

A. My recollection is that they had paid off all of their men, except one small crew.

Q. 344. What was this crew engaged in?

A. Holding these cattle.

Q. 345. Are you able to say, from your own knowledge of what you saw, whether or not it was in fact their final delivery?

A. Yes, sir, it was; their general superintendent told me it was.

Q. 346. I am speaking now of your own knowledge, whether from what you saw you could say it?

A. Yes, they were through rounding up for that season.

Q. 347. What determines the value of stock cattle in the northern part of Montana, up there in that country? A. What determines the value?

Q. 348. Yes, what is the controlling factor?

A. The price of beef on the Chicago market.

Q. 349. Have you kept yourself informed of the price of beef in the Chicago market during the years 1897 and 1898? A. During what years?

Q. 350. During the years 1897 and 1898, and the years prior thereto? A. Fairly well posted, yes, sir.

Q. 351. Do you make it your business to watch the quotations?
A. Yes, sir; I do.

Q. 352. Do you watch them sufficiently always to determine the bearing on the value of stock cattle on the range in Montana?

A. I don't understand the question.

Q. 353. Do you watch the Chicago quotations at least sufficient to keep yourself advised as to the value of range cattle on your range?

A. I am always supposed to.

Q. 354. How does the fluctuation or change of value of beef on the Chicago market affect the value of range cattle on your northern range?

A. Well, the higher beef is in Chicago on the market, the more stock cattle bring on the range.

Q. 355. And the rise of beef on the Chicago market means what?

A. Two or three dollars on beef, would represent probably one dollar on range cattle.

Q. 356. Is there any difference in the character of range stock in this country—are they graded by natives, dogies or Texas cattle?

A. Yes, sir; there is quite a difference.

Q. 357. What is the difference between natives, dogies and Texas cattle?

A. Natives are cattle bred in this country.

Q. 358. What are dogies?

A. Well, you could apply that to all North Dakota cattle.

Q. 359. Oregon and Mexican cattle too, couldn't you?

A. Yes, sir.

Q. 360. What are the Texas cattle?

A. The Texas cattle we don't consider near as good as our Montana cattle.

Q. 361. Well, how are the Texas cattle graded as between Texas and dogies?

A. Texas cattle are poorer cattle.

Q. 362. What are these N. Bar N. cattle?

A. The largest portion of them were Texas cattle.

Q. 363. What were the others?

A. The others were pretty much Montana cattle. The old cows and steers were Texas in that herd.

Q. 364. By steers you mean spayed animals, or steers straight?

A. All the spayed animals that were in that herd, they had raised themselves.

Q. 365. They were natives? A. Yes, sir.

Q. 366. Now, what was the difference in the year 1897, if there was any proportionate difference between the value of the natives and the Texans, in this N. Bar N. herd? A. The beef you are talking about?

Q. 367. Yes.

A. Well, the cattle in that herd would bring about eight or ten dollars less on the Chicago market than the Montana native cattle.

Q. 368. Now, I want to ask you, Mr. McNamara, whether the values of such cattle as are in this N. Bar N. herd, in that market in Northern Montana, had remained unbroken or had changed from the date of the

contract, the 27th day of May, 1897, when you made this contract, down to October 21st, 1897?

A. Stock cattle all over the State of Montana had increased about five dollars.

Q. 369. Had they made such an increase in this herd, in the value?

A. I think so; I think the cattle were worth five dollars a head more in the value than when we bought them.

Q. 370. How much—how did that increase continue, as to being sudden or gradual? A. It was gradual.

Q. 371. Have you any idea what occasioned it?

A. The high price of beef on the Chicago market, and the scarcity of stock cattle; a big demand for them.

Q. 372. Was there any change in the value from October 21st, 1897, down to and including the present season, to the close of the season of 1898?

A. Yes, sir; there was.

Q. 373. To what extent per head, if you can estimate it that way?

A. Well, the only way I can estimate it accurately was by the prices two years ago, and what it is now.

Q. 374. Well, that is what I want—your knowledge of the value of cattle in 1897, and up to the present time?

By Mr. CULLEN.—We object to that as being immaterial, the contrast between what the price of cattle were in 1897, and what they are paying for them now.

(Sustained.)

By Mr. WALLACE.—The question related to the close of the season of 1898, the contract extended, at least, as far as the close of 1898, and the plaintiffs' claim to a specific performance by delivery of 457 head of cattle is based particularly on the ground that the contract extended over a long period of time in which there was likely to be and was large fluctuations and increase in the value.

By Mr. CULLEN.—All of which is immaterial in the present action, this being an action for the specific performance of a contract, and not for the recovery of damages, either general or special.

By the MASTER.—Ruling reserved.

A. I think the value advanced in these two years, about twelve dollars a head.

Q. 375. How much of that advance has been since October 21, 1897? A. I think about half of it.

Q. 376. Now, how has the advance been since October 21st, 1897, as to being sudden at any one time, or as to being gradual? A. It has been gradual.

Q. 377. Do you know how many calves there were in this 457 head of cattle? A. 156.

Q. 378. Those were calves of the year 1897?

A. Yes, sir.

Q. 379. What were those calves worth in the spring of 1898? A. Twenty-one dollars.

Q. 380. Per head? A. Yes, sir.

Q. 381. What did the other animals in this herd of 457 head consist of, Mr. McNamara?

A. One and two year old steers, and one and two year old heifers and bulls.

Q. 382. What were those calves worth October 21st, 1887? A. Twenty dollars a head.

Q. 383. What was done with this 457 head when the receiver took them—where did they go to?

A. They were loaded into the cars and shipped to Big Sandy.

Q. 384. Where were they kept in the winter?

A. At Big Sandy.

Q. 385. On whose ranch?

A. On McNamara's and Marlow's ranch.

Q. 386. Fed with whose hay?

A. Fed with their hay.

Q. 387. With what number of other stock were they kept?

A. Probably with three thousand head of other stock; probably 3,500.

Q. 388. Fed all winter? A. Yes, sir.

Q. 389. Had you counted on feeding this 457 head of stock that winter, Mr. McNamara?

By Mr. CULLEN.—To which we object, as being immaterial, and not tending in any way to change or modify the contract.

By the MASTER IN CHANCERY.—Ruling reserved.
(Overruled.)

A. Yes, sir.

Q. 390. Where did all the cattle go, other than the between eight and nine thousand head out of this herd that were shipped to Chicago market?

A. They went to Big Sandy on our ranches.

Q. 391. What selection of the cattle that went to Big Sandy to your ranches was made for winter feeding?

A. All the calves, and all the heifers one and two year olds we sent there.

Q. 392. About what number of this 457 head under this selection were fed during the winter, including the calves? A. Including the calves?

Q. 393. Yes, sir.

A. About three hundred head of them.

Q. 394. About what proportion of the total number of three thousand or 3,500 head that were fed on your ranches were N. Bar N. cattle, or cattle from this herd?

A. Fully one-half of them.

Q. 395. What preparation had you made for winter feeding on these ranches?

A. We had hay cut, and bought some hay in the fall; rented some pastures adjoining them, next to our own.

Q. 396. To what extent in acreage had you rented pastures?

A. Well, I don't know; a good many acres.

Q. 397. Give a general idea; we don't know whether it is one or a million acres.

A. Well, we have a pasture of about—do you want the pasture I rented?

Q. 398. I want about the total area in acres of the pasture that you had rented that winter. Don't want the actual number, but about the actual number, as near as you can come to it.

A. From a thousand to 1,200 acres; with the hay that was on it.

Q. 399. What was the amount of hay you bought beyond what you put up?

A. Oh, I guess three or four hundred tons.

Q. 400. What total of hay did you have in tonnage bought and put up?

A. We had in the neighborhood of three thousand tons of hay, when we started feeding that fall.

Q. 401. In making these preparations, had you had in mind or had you had any regard for the using of it in connection with the taking care of cattle out of this N. Bar N. herd that would come within the feeding classification which you have given?

By Mr. CULLEN.—To which we object, for the reason that these considerations, if any he had, were not communicated to the defendants at the time of making the contract, and cannot serve to change or modify the contract in any respect.

By the MASTER IN CHANCERY.—Ruling reserved.
(Overruled.)

A. Yes, sir.

Q. 402. Is there any customary period of the year in which the business of contracting for, and delivering range stock in Montana and upon that northern range, transpires—takes place—any time in the year when you buy and deliver?

By Mr. CULLEN.—Objected to for the reason that the custom, if proven, could not modify the contract in any respect.

(Overruled.)

Q. 403. Did you buy at all seasons of the year, and deliver at all seasons of the year, midwinter and at every other time?

A. No cattleman buys cattle except in the spring.

Q. 404. Why didn't they buy and deliver in November, and December and January?

By Mr. CULLEN.—Objected to as immaterial.

(Overruled.)

By the MASTER.—Ruling reserved.

A. Our winter always commences in November on the range.

Q. 405. Well, what does the winter have to do with it?

A. It is impossible to handle cattle when it starts.

Q. 406. Could you have replaced by purchase and delivery on the range this 457 head—or bought a similar bunch of cattle, 457 head of stock cattle—at that time of the year? A. No, sir, we could not.

Q. 407. Have you been engaged, in any period of time, Mr. McNamara, in supplying beef to Indian agencies, or forts or posts? A. Yes, sir.

Q. 408. For what length of time?

A. For the past eight or nine years.

Q. 409. Constantly?

A. I think every year for the past seven or eight years.

Q. 410. What posts or agencies have you so supplied in Montana?

A. Blackfoot Agency, Fort Peck Agency, and the Belknap Agency, and Fort Berthold in North Dakota.

Q. 411. What sorts or condition of cattle do you so supply in this work, and for what purposes?

A. For beef purposes, and for breeding purposes.

Q. 412. Using what class of cattle? A. For beef?

Q. 413. Yes, sir. A. Dry cows and steers.

Q. 414. And for breeding purposes?

A. One and two year old heifers.

Q. 415. And calves? A. And calves, yes, sir.

Q. 416. From what source, do you, in your business, get your supplies to furnish these animals in this Indian work? A. Get them by buying herds of cattle.

Q. 417. How far in advance do you make provision for this source of consumption that you mention?

A. Twelve months, generally.

Q. 418. You may state whether or not in the purchase of this herd of N. Bar N. cattle, you were buying them for the purpose of supplying this demand in your business, partly or wholly.

By Mr. CULLEN.—We object to the question, for the reason that it does not appear by the testimony of this witness, or any other, that the purpose plaintiffs had in purchasing was communicated to the defendant at the time the purchase was made, and the same cannot be received in evidence so as to modify in any respect the contract then made.

(Overruled.)

By the MASTER IN CHANCERY.—Ruling reserved.

A. Yes, sir.

Q. 419. To what extent in this supply business that you have mentioned did you use cattle out of this herd as you have contemplated?

A. I think about nineteen hundred head.

Q. 420. Consisting of what class of animals from the herd?

A. Steers and cows, and one and two year old heifers and bulls.

Q. 421. What, if any, part of this 457 head in suit in this action did you so use in supplying that demand?

By Mr. CULLEN.—Objected to as immaterial, for the reason that it does not appear that the demand could not have been supplied without the use of this 457 head in question.

(Overruled.)

By the MASTER IN CHANCERY.—Ruling reserved.

A. Used about 300 head.

Q. 422. At what agencies, if you know?

A. Fort Berthold and Fort Belknap.

Q. 423. Could you have bought and had delivered to yourself on the range, at that season of the year—that is, after October 31st, or during the winter following—the winter of 1897 and 1898, cattle to have replaced these cattle for such use at all?

By Mr. CULLEN.—Objected to, for the reason that it does not appear that there was any necessity for the purchase of such cattle, for the purposes named.

(Overruled.)

A. No.

Recess until 2 o'clock P. M.

Direct examination of Mr. McNamara continued.

Q. 424. Could the lack of this 457 head of cattle, or the three hundred head that you used after the winter for Indian purposes, have resulted in any damage to your firm? A. Yes, sir, it could.

Q. 425. Would that damage have been slight or considerable? A. It would have been considerable.

Q. 426. How would you estimate it, or determine it in money?

A. Well, I am unable to determine it in money—what the loss to us would be.

Q. 427. Could it be estimated or determined in money? A. I don't think so.

Q. 428. Did you have any talk with Loss Blackman, the manager of the defendant cattle company, concerning the number of head they had gathered the shipped in the year 1898? A. Yes, sir.

Q. 429. Out of this N. Bar N. herd?

A. Yes, sir.

Q. 430. When and where did it take place?

A. It took place in this building, I think on the 30th day of November.

Q. 431. 1898? A. 1898, yes, sir.

Q. 432. It was along after the close of the shipping season? A. Yes, sir.

Q. 433. What, if anything, did he say about it?

By Mr. CULLEN.—To which we object, as being immaterial.

(Sustained.)

By the MASTER.—Ruling reserved.

A. He said that they had gathered and shipped nearly 600 head, or his exact words were “less than six hundred head.”

Q. 434. Do you know the whereabouts of the ranges of this defendant cattle company Mr. McNamara?

A. Yes, sir.

Q. 435. Do you know the improvements that are on it?

A. Yes, sir.

Q. 436. You have seen them have you?

A. Yes, sir.

Q. 437. Have you had anything to do with the construction of similar improvements—buildings of like kind?

A. Yes, sir.

Q. 438. Have you learned what it costs to construct them, and what they are worth after they are constructed?

A. I have a general idea what it would cost to build buildings of that kind.

Q. 439. What in your opinion were these buildings worth in that locality in October, 1897?

A. I wouldn't consider them worth very much. They were in a tumble down and bad shape—the dwelling-house and other buildings there.

Q. 440. That includes such buildings as they had around their pasture, does it?

A. The buildings were all about the same.

Q. 441. How about the fences?

A. The fences were in about the same condition.

Q. 442. What value would you put upon them all?

A. I wouldn't value them at over \$1,500.00 or \$2,000.00.

Q. 443. Does a range privilege have any value, such as belonged to the N. Bar N. people?

A. No, sir, there isn't such a thing as a range privilege in Montana, other than people have the same right to the range as The Home Land and Cattle Company people would have.

Q. 444. When they sold out their brand, and all their cattle, they ceased to enjoy their use of it?

A. Yes, sir.

Q. 445. What, in your opinion, was that band of horses worth that were brought into that corral, take them all through?

By Mr. CULLEN.—I object to that as immaterial, and not embraced within the issues in this case.

(Sustained.)

By the MASTER IN CHANCERY.—Ruling reserved.

A. The horses wouldn't sell for more than twelve dollars a head out of that herd.

Q. 446. What have you to say, Mr. McNamara, as to your readiness, and that of your co-complainant, or the firm of McNamara & Marlow, during or since October, 1897, and at all times during the year 1898, to go ahead and perform your part of that contract?

By Mr. CULLEN.—Objected to, for the reason that they refused to perform it on the 22d day of October, 1897.

(Overruled.)

By the MASTER IN CHANCERY.—Ruling reserved.

A. We were always ready to carry out our part of the contract.

Q. 447. What request or demand, if any, did you make of the defendants, or either of them, that they, in the year 1898 should continue the performance of this contract?

(Overruled.)

By Mr. CULLEN.—Objected to, for the reason that they refused to perform their contract on the 22nd day of October, 1897.

By the MASTER IN CHANCERY.—Ruling reserved.

A. We wrote them a letter, demanding that they turn over the cattle to us, as provided for in the contract.

Q. 448. Is that the letter, Exhibit "E," introduced in evidence in this case?

A. Yes, sir, that is the letter that we wrote to them, or a copy of it.

Q. 449. What have you to say as to whether Exhibit "F" is the response made by the defendant cattle company to your letter? A. This is their response.

Cross-Examination.

(By W. E. CULLEN Esq., of Counsel for Defendants.)

Q. 1. Did you meet Mr. Van Blarcom more than once?

A. Never met him but once.

Q. 2. Where was that? A. St. Louis.

Q. 3. At the National Bank of Commerce?

A. Yes, sir.

Q. 4. How did you happen to go there, Mr. McNamara, to meet Mr. Van Blarcom? A. Yes, sir.

Q. 5. What, if any, conversation did you have with him at that time about this contract?

A. I asked him if there would be any shortage of steers on that contract, whether he would make it good or not according to the terms of the contract. He said he would give me an answer at two o'clock on that day—it was in the forenoon—that he wanted to have a talk with Mr. Niedringhaus.

Q. 6. Was that all the conversation that you had with him regarding the contract?

A. He said that—No, I don't think it was.

Q. 7. What else occurred?

A. He said that his understanding was that he was to live up to the contract, as it had been assigned to them, and would do so.

Q. 8. Yes, when did he say that?

A. About two o'clock in the afternoon of the day that I was in St. Louis.

Q. 9. When was that?

A. I think it was in August, 1897. I think it was in August; I am not positive as to the date. I never was there but once and it was the time I was in St. Louis.

Q. 10. And you think that was in August?

A. I think it was in August, yes, sir.

Q. 11. Can you give us any idea what time in August it was?

A. I can get some reference, I think, and give you the

exact date. I think I can; I think I can do it now by having Mr. Marlow look over the books.

Q. 12. You think that at the time this contract was made you reached Chicago on the morning of the day the contract was made? A. Yes, sir.

Q. 13. You went directly to Rosenbaum Brothers office near the stockyards from the hotel?

A. Went directly from the depot.

Q. 14. What time did you arrive that morning?

A. I think we got to Mr. Rosenbaum's office at ten o'clock that morning.

Q. 15. What time did you arrive in Chicago.

A. About nine o'clock.

Q. 16. Did you have any baggage? A. Yes, sir.

Q. 17. What, a small valise? And took that with you to the office? A. No, sir.

Q. 18. What did you do with that?

A. Sent it to the Auditorium Annex.

Q. 19. You think that both of the Mr. Niedringhaus were there when you arrived at Rosenbaum's office?

A. I met them there that morning after I arrived.

Q. 20. Were they there then when you got there or did they come afterwards?

A. I am not positive as to that.

Q. 21. Who was present at the making of this contract besides yourself and the Messrs. Niedringhaus?

A. Mr. Joseph Rosenbaum.

Q. 22. He was the gentleman that you had a conversation with in Miles City about the purchase of these cattle previously, was he? A. Yes, sir.

Q. 23. *He have* anything to do with the making of this contract? A. No, nothing; no, sir.

Q. 24. Took no part in the negotiations?

A. I think that he was working in the interest of Niedringhaus, in the way of getting a commission if he could sell the cattle. Understand, I don't know this; I think he was.

Q. 25. Now did he take any part in the negotiations which took place between yourself and Mr. Niedringhaus for the purchase of these cattle—Mr. Joe Rosenbaum?

A. I don't know that I exactly understand you, Judge.

Q. 26. Did Mr. Rosenbaum have anything to say during the time that you were negotiating the purchase of these cattle with reference to it?

A. Yes, he was talking about the purchase of these cattle in a general way.

Q. 27. He was there all the time you were engaged in arranging the terms of your contract, wasn't he?

A. I don't know; he was there some of the time but I wouldn't be positive how much.

Q. 28. How long did it take to fix up this contract?

A. Do you mean the writing of the contract or completing the sale?

Q. 29. No, from the time you went there?

A. We completed the sale about one o'clock.

Q. 30. Got there about ten? Take any lunch?

A. Yes, sir, we took lunch and immediately after the lunch the sale was completed.

Q. 31. The contract was drawn and signed at once?

A. Not directly, it took some time to draw the contract.

Q. 32. But the trade was completed right after that?

A. Yes, we might have been to lunch a little while, and it may have been a little after one o'clock.

Q. 33. When did you leave Chicago after the completion of the contract? A. Next day, I think.

Q. 34. That would be the 28th, wouldn't it?

A. Yes, sir, that is my recollection, that we didn't delay there only that one day.

Q. 35. What was the price of beef in the market on that day, the 27th day of May, 1897?

A. I cannot say exactly.

Q. 36. Mr. Rosenbaum is one of the brokers at the Chicago stockyards, isn't he?

A. He is a very large broker.

Q. 37. Well, one of the largest in western beef?

A. Yes, I think he handles more western beef than any other man in the Chicago Stockyards.

Q. 38. Didn't you make any inquiries as to the price of beef of Mr. Rosenbaum?

A. I don't think I did; beef at that time of the year cut very little figure with range cattle.

Q. 39. Yes, I understand that, but you hadn't been in Chicago for some time?

A. I had been there two weeks before that.

Q. 40. Did you make any inquiry as to beef then?

A. Only generally I had seen the market quotations.

Q. 41. Well, what was about the market price about May 27th, 1897 for beef in the market?

A. Well, beef in the market was about from \$3.65 to \$5.25 or five cents. But, understand, that wasn't range beef.

Q. 43. What kind of beef was it?

A. Corn-fed beef.

Q. 44. That was worth a little more than range beef, wasn't it? A. They are so considered.

Q. 45. When did you ship the first load of cattle to Chicago out of this N-N herd? A. In July.

Q. 46. What time in July, Mr. McNamara?

A. I don't remember the date.

Q. 47. You personally conducted the cattle business of McNamara and Marlow during the season of 1897 up till September, didn't you? A. Yes, sir.

Q. 48. What was your first shipment to Chicago out of this herd? A. Beef cattle?

Q. 49. Yes, how many? A. I don't remember.

Q. 50. Haven't you the figures right here where you can get at them? A. I think so.

Q. 51. Well, will you refer to your books and tell us how many you shipped in your first shipment?

A. I don't think I shipped any of those cattle in July; I think we commenced shipping in August.

Q. 52. You want to amend your answer then in that respect? A. Yes, sir.

Q. 53. At what time in the year is the market usually best for range stock in Chicago? Range beef?

A. It varies considerably

Q. 54. It does?

A. Yes, some years it is best in July and August and other years it is best in October.

Q. 55. How was it in 1897?

A. The first shipment about the same.

Q. 56. When did your first shipment from the N-N herd reach Chicago?

A. Why they should reach Chicago about the 16th or 17th of August.

Q. 57. Did you get the market price for those cattle?

A. I think so.

Q. 58. What did you get per hundred pounds for them? A. About four cents.

Q. 59. Now, when did you make the last shipment from that herd? A. To Chicago?

Q. 60. To Chicago.

A. About the first of October.

Q. 61. How many did you ship at that time?

A. Shipped all the beef there was there that was fit to go. I don't know how many.

Q. 62. How many? A. I don't know.

Q. 63. In your sale of about the first of October how many did you sell from this herd?

A. Sold about 800.

Q. 64. How did those compare in quality with those you first shipped?

A. They were about the same quality and the same class of cattle.

Q. 65. Weren't the first shipped a little thinner than those shipped last?

A. I don't think so; no. I think they were just as good as the last cattle.

Q. 66. What did you get for that lot of cattle?

A. Got about four cents for the best of them.

Q. 67. Well, all around what would it average?

A. Average about 3.90

Q. 68. Average about 3.90?

A. Yes, the steers, yes, sir.

Q. 69. Did you give me the average of your first shipment or the top price for your best steers?

A. I gave you about what they were selling for.

Q. 70. About the average?

A. Yes, they were selling for about—average about 3.90 to four cents, I think.

Q. 71. How many cattle were in the first shipment, did you say—did you give the number?

A. No, sir; but I guess I can, though. On the 12th of August, 507 head; on the 14th, 483 head, and again on the 14th, 476 head.

Q. 72. That is all part of one shipment?

A. That is all one shipment, yes, sir.

Q. 73. When had those cattle been received from the defendant company?

A. They were receiving them in the stockyards at Oswego all day.

Q. 74. Then they were loaded and shipped directly to Chicago? A. Yes, sir.

Q. 75. When was the first delivery of cattle under that contract made by the defendant?

A. I think a small delivery was made to me on July 1st. July 1st the first delivery.

Q. 76. How many were delivered then?

A. About 230.

Q. 77. What was done with those cattle?

A. They were taken to Fort Peck Agency.

Q. 78. What kind of cattle were those—beef or stock cattle? A. 188 head of them were steers.

Q. 79. When was the next delivery made?

A. August the 12th.

Q. 80. No more deliveries until August the 12th, eh?

A. That is my recollection about it.

Q. 81. And then they delivered altogether how many cattle?

A. There was turned over to us in that delivery running from—

Q. 82. August the 12th to the 15th?

A. About 3,400 head.

Q. 83. Those were all beef cattle, were they not?

A. No, sir.

Q. 84. How many beef cattle were there or how many stock cattle, either one, which ever is most convenient to get at?

A. I cannot give you that very accurately, I don't think. They are all mixed up here together, cows and steers together.

Q. 85. The total number you can give?

A. Yes, sir; 3,400 head.

Q. 86. Now, was that 3,400 head all paid for in one draft? A. Yes, sir.

Q. 87. How long does it take to run from Oswego to Chicago?

A. It takes about four days. To run cattle, you mean?

Q. 88. Yes, sir. A. Yes, sir.

Q. 89. Now, these train loads were shipped on the 12th and 14th you think at Oswego? A. Yes, sir.

Q. 90. And it would take them four days to get to Chicago? A. Yes, sir.

Q. 91. And so it wasn't until four days afterwards that you made any sales in Chicago? A. No, sir.

Q. 92. Were those cattle sold promptly on their arrival? A. Oh, yes.

Q. 93. Always? A. Yes, sir.

Q. 94. Now, when did you next receive cattle from these parties on this contract after these lots on the 12th and 14th of August? A. Well, about August 18th.

Q. 95. Four days later? A. Yes, sir.

Q. 96. You received all those cattle personally, did you not? A. Yes, sir.

Q. 97. How many did you receive on August 18th, all told? A. I can't tell exactly.

Q. 98. Just approximately.

A. Received from August 18th up, including the 22d, about 3,800 head.

Q. 99. Were you at Oswego from the 18th to the 22d?

A. From the 18th to the 22d?

Q. 100. Yes, sir. A. Yes, sir; I was there.

Q. 101. Had you been there since the 14th, or did you return there—return home again?

A. No, sir; I wasn't there between shipments; I never stayed there, only when I was receiving cattle there.

Q. 102. Then you stayed there from the 18th to the 22d?

A. I was there on the 18th and on the 22d.

Q. 103. On the 18th and on the 22d?

A. Yes, sir; in the meantime I was at Oswego.

Q. 104. At Oswego all the time?

A. Yes, sir; between the 18th and the 22d.

Q. 105. Now, did you pay for these cattle in one draft?

A. Yes, sir.

Q. 106. When was that draft given?

A. It was given immediately after the cattle were received and shipped.

Q. 107. Now when did you next receive cattle under this contract? A. September 2d.

Q. 108. September second was the next receipt?

A. Yes, sir.

Q. 109. How many cattle were received then?

A. On September 2, 3, and 4th there was 2,350 head received.

Q. 110. When was payment made for those cattle?

A. When was payment made?

Q. 111. Yes, sir.

A. Immediately after the cattle were gotten.

Q. 112. Now, when was the next delivery?

A. About September 30th.

Q. 113. Did that extend over more than one day?

A. Yes.

Q. 114. How many days did that extend over?

A. September 30th to October 2d.

Q. 115. How many cattle were delivered at that time?

A. About 1,600 head.

Q. 116. When was payment made for those cattle?

A. After the cattle were received.

Q. 117. How long after?

A. Long enough for me to get home and report the number of cattle.

Q. 118. Whom did you report the number of cattle to?

A. Reported it to my bookkeeper.

Q. 119. Where was your bookkeeper?

A. At Big Sandy.

Q. 120. So that you then made payment for the cattle?

A. Yes, sir.

Q. 121. Do you remember what data you gave him?

A. No, sir; I do not.

Q. 122. Then prior to October 21st and 22d, for all the cattle you had received under this contract, you had issued five drafts, had you?

A. I don't remember the number.

Q. 123. How many had you issued?

A. I had issued one draft for each delivery of those cattle.

Q. 124. You had previously paid for the first bunch that you had sent to the Fort Peck Agency?

A. No, sir; never paid for those cattle, till a month after I had received them.

Q. 125. But you made a separate draft for that bunch of cattle? A. No, sir; I did not.

Q. 126. How were those paid for?

A. They were paid for with the cattle I received on August 12th.

Q. 127. So, then, there would be four drafts if you were correct as to the time of payment and the amounts paid for?

A. No, I think these cattle were paid for on or about the 29th of July.

Q. 128. What makes you think that now, Mr. McNamara?

A. Because I find that we received some cattle there about that time but no shipments to Chicago. Received some stock cattle along about the middle of July; and at that time I paid for the two hundred and thirty odd head that I had taken to the Fort Peck Agency on July 1st.

Q. 129. Then if you are correct about the times of payment there was five drafts in all?

A. I don't remember the number of drafts they were paid for on the delivery of the cattle.

Q. 130. But you are not able to state the number of drafts paid?

A. No, I am not. If it is important I can find it.

Q. 131. Going back to this interview with Mr. Van Blarcom, this letter that was produced shows it to have been August the 26th? A. Yes, sir.

Q. 132. Up to that time about how many cattle had been delivered under this contract?

A. Up to what date?

Q. 133. August 26th?

A. Well, I'll have to go to figuring. About 11,000 head.

Q. 134. Of that 11,000 about how many were steers and spayed heifers?

A. I can give you an exact statement of the number with a little time to do it. I can do it, but it will take me too long to figure it out, but I can give you the exact statement of it.

Q. 135. Very good; I would like to have an exact statement of it? A. Yes, sir.

Q. 136. You will supply it later? A. Yes, sir.

Q. 137. Now, had there been any correspondence between you and Mr. Van Blarcom about any shortage in cattle or anything about this contract? A. No, sir.

Q. 138. Where did you go from to St. Louis?

A. *Went from Big Sandy.*

Q. 139. And you went for the purpose of seeing about this shortage did you? A. Yes, sir.

Q. 140. At that time what was there to indicate to you that there would be any shortage?

A. That there would be any shortage?

Q. 141. Yes, sir.

A. Mr. W. F. Niedringhaus told me that in the future he would prefer that I would pay for the cattle every day as he turned them over, and when he told me that I couldn't see what reason he had for it other than to keep these cattle cleaned up there all the time, and at the end

of the season rob us out of the money that was due us. That was my reason for going to St. Louis.

Q. 142. Afraid of being robbed?

A. Afraid of being robbed out of the money that was due us under the cattle contract.

Q. 143. How long were you in St. Louis?

A. One day.

Q. 144. Now, when was it that Mr. Niedringhaus had this conversation with you?

A. It was the day before I started for St. Louis, or the same day.

Q. 145. Well, what day did you start for St. Louis?

A. I don't know the date.

Q. 146. How long had you been in St. Louis before you called on Mr. Van Blarcum?

A. Called on him immediately after getting in there.

Q. 147. You had gone directly then from Big Sandy to St. Louis?

A. Yes, sir; I went directly.

Q. 148. Say you didn't stop over anywhere?

A. No, sir, if you call going by the way of Chicago direct; that is the way I went.

Q. 149. Did you stop over in Chicago?

A. Stopped in Chicago one day; got in there in the morning, and went out in the afternoon; was there part of the day.

Q. 150. Now, how long does it take to go from Big Sandy to St. Louis by way of Chicago stopping there a day?

A. I think about seventy-two hours.

Q. 151. Where was it that Mr. Niedringhaus had this talk with you?

A. In the Traders' store at Oswego.

Q. 152. And that was the same day you started or the day previous, you say?

A. It was right soon after that; I think it was the next day.

Q. 153. What were you doing at Oswego at that time?

A. Had been receiving cattle.

Q. 154. Had been receiving, when did you receive?

A. I had received that day that he told me.

Q. 155. After that you did pay for the cattle as they were received, did you not?

A. I don't know; no, I don't believe we did; I don't believe they wanted it. I don't know so much about the payment after that. Mr. Marlow was with me and whenever we are together Mr. Marlow generally looks after the financial part of the business.

Q. 156. Mr. Marlow didn't get down there until about the end of September?

A. I think so; I think Mr. Marlow was there after all the deliveries you are speaking about.

Q. 157. The same month?

A. Yes, sir; September 2d.

Q. 158. So that he is mistaken if he thinks he didn't get down there by September?

A. He knows exactly or he should know.

Q. 159. Where you on October 20th, 1897?

A. I think I was at Big Sandy.

Q. 160. Did you see Mr. Niedringhaus on that day?

A. I think I saw Mr. Niedringhaus.

Q. 161. Mr. W. F. Niedringhaus?

A. Mr. W. F. Niedringhaus on what date?

Q. 162. October 20th, 1897.

A. No, sir; I did not.

Q. 163. You didn't have any conversation with him on that date? A. No, sir; I don't think so.

Q. 164. Now, is the conversation which you have testified about as having taken place between yourself and Mr. Niedringhaus the one which you told Mr. Wallace took place about October 20th, or was there another conversation afterwards?

A. I didn't have any conversation with Mr. Niedringhaus on the 20th.

Q. 165. Did you have more than one conversation with Mr. Niedringhaus about paying for the cattle?

A. I don't exactly understand you, Judge, what you mean by paying for the cattle. Do you mean with regard to the draft?

Q. 166. You have testified that about August 22d Mr. Niedringhaus said that he preferred that you paid for the cattle when they were delivered; did you ever have any other conversation at any other time or place with Mr. Niedringhaus about the same subject?

A. No, sir; I don't think so.

Q. 167. Then his conversation took place at Oswego? Who was present at it besides yourself and Mr. Niedringhaus? A. No one.

Q. 168. Can you recollect the place in Oswego where you had this conversation?

A. In the Traders' store.

Q. 169. What led up to the conversation—what had you been talking about?

A. Mr. Niedringhaus told me that he had received a letter from the Bank of Commerce or from Mr. Van Blarcum, I don't know which he said, asking him to hurry up drafts a little faster for the cattle.

Q. 170. What did you say in response to that?

A. I didn't say anything. That is the reason that he demanded that drafts be made out on each delivery, which I told him I was prepared to do.

Q. 171. You have testified, now, to another conversation that took place about October 1st at Oswego between yourself and Mr. Niedringhaus; what led up to that conversation—who commenced it?

A. Mr. Niedringhaus—Mr. W. F. Niedringhaus.

Q. 172. What did he say?

A. He asked me how many cattle I thought they were going to be short on the steers of the ages of two and three up and spayed heifers, and I told him that I certainly thought the way things were turning out it would be two thousand head short. He said he didn't think it would, but that they would be short a thousand, and that he would pay us \$20,000.00 and settle it; and I told him No. that I couldn't entertain ~~that~~ proposition, but that I would take \$30,000.00 and settle it, provided he would keep his horses and not compel me to take his horses, and he told me he would give me an answer in the morning, which he did, declining the proposition.

Q. 173. There was nothing else passed between yourself and Mr. Niedringhaus?

A. Mr. Marlow was with me; he stood there while this conversation took place but didn't hear it, I don't think.

Q. 174. It was Mr. W. F. Niedringhaus with which you had this conversation about September 30th, wasn't it; H. L. Niedringhaus wasn't there?

A. It was Mr. W. F. Niedringhaus.

Q. 175. The president of the company?

A. Yes, sir.

Q. 176. Where did he find you the next morning when he returned? A. At the stockyards.

Q. 177. Was there anything further took place in that conversation except what you have narrated?

A. No, sir, there was not.

Q. 178. Nothing regarding the settlement for the cattle? A. No, sir.

Q. 179. You made no reply when he told you he wouldn't accept your proposition?

A. Yes, sir; I told him he was very much mistaken if he thought they wouldn't be short two thousand head.

Q. 180. And that ended the conversation?

A. Yes, sir.

Q. 181. The next conversation that you had with any representative of this company was with Mr. Blackmon, was it? A. I don't know whether—

Q. 182. This was October 1st; now, did you have any conversation between the time you had this conversation

with Mr. Niedringhaus and the one you have testified to as having had with Mr. Blackmon?

A. With regard to what?

Q. 183. With regard to these cattle.

A. In what respect?

Q. 184. In any respect.

A. I don't think I quite understand you, Judge.

Q. 185. Did you have a conversation with Mr. Blackmon with reference to the delivery of these cattle?

A. Why he was turning the cattle over to me himself. Mr. Blackmon was there as their representative and he and I always counted the cattle. We were always talking about the cattle when we were receiving them.

Q. 186. Had you received any cattle between October 2d and October 14th?

A. Between October 2d and October 14th, no, sir.

Q. 187. Your conversation with Mr. Niedringhaus was concluded on October 2d, wasn't it, on the morning of October 2d?

A. Yes, we had a talk that next morning about the next delivery of cattle—when it would take place. He said to me that morning that he would make the final delivery about the 14th.

Q. 188. That was Mr. Niedringhaus?

A. That was Mr. W. F. Niedringhaus.

Q. 189. Now, subsequent to that time did you have a conversation with Mr. Blackmon about this matter?

A. I think probably I did.

Q. 190. When do you think that took place?

A. I don't remember; in fact, I don't remember the conversation, but I wouldn't say that I didn't have it.

Q. 191. From October 2d to October 14th where were you?

A. I guess I was at Big Sandy. That is my home.

Q. 192. Where were you October 14th?

A. I was at Oswego.

Q. 193. Well, did you have any talk with Mr. Blackmon that day? A. Yes, sir.

Q. 194. Where did that take place?

A. It took place in front of the Traders' store, in the Traders' store and at the stockyards.

Q. 195. How did that conversation commence?

A. I asked him if he was ready to turn over his cattle and he said he was, but he didn't have any instructions to turn them over.

Q. 196. Tell you where the cattle were?

A. I knew where the cattle were.

Q. 197. Was that all the conversation you had with Mr. Blackmon on that occasion?

A. No, I don't think it was; but it was all with regard to the cattle.

Q. 198. He told you that he had no instructions to turn them over?

A. I says, "Well, I am here to get the cattle, Blackmon, and somebody should be here in charge of these cattle and know whether he wanted to turn them over or not." He said Mr. H. L. Niedringhaus would be there to turn the cattle over, but that he couldn't give me an answer until Mr. H. L. Niedringhaus arrived.

Q. 199. That was all of the conversation between you and Mr. Blackmon at that time?

A. Yes, all that I remember.

Q. 200. Was there anything said about the number of cattle that they had rounded up and were holding?

A. About 1,400 head.

Q. 201. Well, was that said?

A. Yes, sir, Mr. Blackmon told me how many they had.

Q. 202. Did he say when they had finished rounding up?

A. No, I don't believe he did; if he did I don't remember it.

Q. 203. Did he say where the 1,400 head were?

A. I knew where they were.

Q. 204. You did know where they were?

A. Yes, sir.

Q. 205. But he said nothing about it?

A. I don't remember; I don't think I asked him because I knew where the cattle were; because I could see them.

Q. 206. See them where they were being held?

A. You could see them about a mile from Oswego. My foreman was there and told me just where they were.

Q. 207. Do you know whether they received any cattle after that day or not?

A. Whether they gathered any?

Q. 208. Whether they gathered any or any were driven in?

A. Yes, sir.

Q. 209. There were? A. Yes, sir; 17 head.

Q. 210. Where were they gathered from?

A. Gathered in from the bends of the Missouri River.

Q. 211. When was it that Mr. Albert Niedringhaus had got his keg full that you told Mr. Wallace about?

A. I don't know when he got it full; it was on the 14th that I saw him there.

Q. 212. Up to that time what, if anything, had Mr. Albert Niedringhaus had to do with the delivery of these cattle?

A. He was always assisting with Mr. Blackmon; also counted the cattle with Mr. Blackmon.

Q. 213. Do you know whether he held any official position in the defendant company?

A. I cannot tell.

Q. 214. Know whether he had any stock in the company or connection with it?

A. No, sir; I do not.

Q. 215. Who was Mr. Albert Niedringhaus?

A. He is a son of the president of the company.

Q. 216. How old a man is he?

A. I don't know; I should judge a boy not over twenty-eight, probably not over twenty-four.

Q. 217. I believe you said you declined to take a drink?

A. I certainly did; it was Indian whisky.

Q. 218. And the remark that he made with reference to its being a cold day when a Niedringhaus got left might refer to taking a drink.

A. I have no idea what he did refer to.

Q. 219. Now, I will ask you to restate as nearly as you can exactly what was said in the conversation between yourself and Mr. H. L. Niedringhaus when he arrived that evening.

A. I met him at the train, and told him that Mr. Blackmon had said to me that he was through gathering and asked him when he would turn the cattle over, that Mr. Blackmon didn't appear to know when the cattle would be turned over; Mr. Niedringhaus said he wasn't prepared to turn them over then, but probably might be in a week or ten days, and said, "I will probably come up and see you." I said, "All right; let me know when you are ready to turn them over," and I got on to the train and went home.

Q. 220. On the 21st day of October you reached Oswego about 11 o'clock, did you?

A. Yes, sir; I think that is about the time the train got there that day.

Q. 221. Who did you first meet connected with this defendant when you arrived, what officer or agent?

A. I met Mr. Albert Niedringhaus and Mr. Blackmon, and one Sharp was with them.

Q. 222. You were introduced to Mr. Sharp at that time?

A. Yes, sir; as a gentleman out there taking a hunt.

Q. 223. Where were the cattle sent to that you received on the 22d?

A. I think the cattle I received on the 22d went to Poplar.

Q. 224. How far is that from Oswego?

A. Oh, it's about thirty miles.

Q. 225. Who took these cattle to Poplar?

A. My men.

Q. 226. How many men did you have down there at that time?

A. I had three men there steady all the time.

Q. 227. Herman Knoell and your cook, and who else?

A. A fellow by the name of Bob Dye and a man by the name of Rose.

Q. 228. Three men beside the cook?

A. Yes, sir.

Q. 229. What time did you get those cattle started to Poplar? A. I think about ten o'clock.

Q. 230. On what date, the 22d?

A. Well, I think it was the 22d.

Q. 231. The cattle were driven to Poplar, they were not shipped? A. They were driven, yes, sir.

Q. 232. How long did it take to drive them down there, do you know?

A. It took a couple of days—two or three days; I don't remember. I didn't go with the cattle myself.

Q. 233. Mr. Albert Niedringhaus then came to your tent, did he, after the cattle were delivered on the 22d?

A. Yes, sir.

Q. 234. And he requested you to pay for the cattle that had been delivered that day and the day before?

A. Yes, sir.

Q. 235. You made no objection to that because of the fact that there was 457 head of cattle that had not been delivered as yet, did you?

A. We objected to paying him for these particular cattle in the way he wanted to be paid for them.

Q. 236. But you didn't object because there was 457 head of cattle on the prairie that hadn't been turned over to you?

A. No, sir; I don't think so.

Q. 237. Now, when Mr. Sharp came up there with Mr. Albert Neidringhaus what took place between yourself and Mr. Marlow and Mr. Niedringhaus and Mr. Sharp with reference to this matter?

A. Mr. Marlow went to work to figure up, figuring in all the cattle that we had taken on the 21st and 22d, figured in 457 head that were out and 500 horses at \$20.00 a head, and then deducted the number of steers that they were short, which amounted to about 1,900 head, and offered them the difference between \$38,000.00 and what the stuff came to which they refused to take.

Q. 238. What did they say about accepting it?

A. They said they had no authority to make any settlement with us at all.

Q. 239. Was that all that was said in that conversation?

A. I don't remember if there was anything more said.

Q. 240. Anything said about any breach of your contract or anything of that sort?

A. If there was I didn't hear it.

Q. 241. You were there all the time participating in the conversation? A. Yes, sir.

Q. 242. How large a tent is it that this took place in?

A. It is a tent 14 feet square; probably 14 by 16.

Q. 243. When was it that you counted the horses they brought up. A. The day they brought them in.

Q. 244. How did you count them?

A. How did I count them?

Q. 245. Yes, sir.

A. Strung them out in the corral and counted them in that way.

Q. 246. You didn't drive them through a gate, did you?

A. Yes, sir; drove them through gates and strung them out.

Q. 247. Were the horses all together when you counted them?

A. No, sir; I took 500 head of horses out of the entire herd and counted them as I took them out and kept them in a place by themselves.

Q. 248. When did you count the balance of them?

A. Just as soon as I had them counted.

Q. 249. Anybody else count them with you?

A. Not with me, no, sir; I counted them alone.

Q. 250. They were in a portion of the stockyards by themselves? A. Yes, sir.

Q. 251. Well, did you simply go in there and count them?

A. Yes, sir; I went in there and stirred them around and counted them. There was 83 head of them left.

Q. 252. Where was Niedringhaus and Sharp at that time? A. There were in the corral.

Q. 253. With you? A. No, sir.

Q. 254. You were alone when you counted those?

A. This 83 head?

Q. 255. Yes, sir.

A. Yes, sir; I counted those 83 head alone.

Q. 256. How long were those horses in the corral after they were separated?

A. Not very long; about half an hour, maybe an hour.

Q. 257. Did you go down to your tent again after they were turned out? A. No, sir.

Q. 258. Where was it that they demanded payment for those cattle? A. In the stockyards.

Q. 259. What was it that they said? Just repeat the conversation and tell us between whom it took place. Now about the payment only.

A. About the payment for the horses?

Q. 260. Yes, in the stockyards?

A. Well, after we counted the 500 head of horses out we got them separated and Mr. Marlow then made them the same kind of a tender that we had made in the tent before that.

Q. 261. Well, how did he do it?

A. By offering them the money. Legal tender currency.

Q. 262. Did he have the money with him?

A. Yes, sir.

Q. 263. Had it in his pockets?

A. Had it in his pockets. I don't believe he had it in one.

Q. 264. Did you see the money? A. Yes, sir.

Q. 265. Where was Mr. Niedringhaus and Mr. Sharp at this time? A. Right with us in the stockyards.

Q. 266. Mr. Marlow offered the money to them?

A. Yes, sir.

Q. 267. What did they do about it?

A. Wouldn't accept it.

Q. 268. Well, did that conclude the conversation about it? A. That is about all I heard about it.

Q. 269. Did you hear anything about a breach of contract then?

A. Well, I might have heard it; I wouldn't be positive. I think I told them they had broken the contract, and I am pretty sure they told me I had broken it.

Q. 270. You had considered that they had broken the contract?

A. I certainly considered they had broken the contract.

Q. 271. Well, how long was it after the offer was made before the horses were turned out?

A. It might have been a half an hour or an hour.

Q. 272. You were present at the time Niedringhaus and Sharp both ordered the horses turned loose?

A. I heard them give the order; yes, sir.

Q. 273. Where were your men at this time?

A. They were in the yard. Herman Knoell was the only man we had there at this time.

Q. 274. Herman didn't go with these cattle then?

A. No, sir.

Q. 275. How many men did it require to take these cattle to Poplar? A. It required about three men.

Q. 276. You had three men besides Herman Knoell?

A. Herman Knoell and three others; yes, sir.

Q. 277. How many men took these cattle?

A. I think three.

Q. 278. Three besides Herman or three with him?

A. I think I told Herman to get three men to take these cattle down; and I think he hired two men and sent one of his men down. I think there was three men altogether, that went with the cattle.

Q. 279. What did you learn—what do you know personally about the number of wagons that the defendant company had employed in making this round-up?

A. I saw a good many of the wagons.

Q. 280. When did you see them?

A. Saw them when they would come in from the round-up.

Q. 281. Whose wagons did you see?

A. I saw Mr. Caldwell's wagon, he was on the north side; he was a man that always helped with the cattle. A man by the name of Len Morrow—I saw his outfit, and Mart Hamby's.

Q. 282. Where did you see Mr. Hamby's outfit?

A. I saw Mr. Hamby's outfit when he pulled in. No, I didn't see his outfit; I saw his outfit when they were crossing the river.

Q. 283. Did you ever see Leavitt's outfit?

A. Yes, sir; I saw his outfit twice.

Q. 284. Was there another man across the river except Caldwell? A. Yes, sir.

Q. 285. Who was that?

A. A man by the name of Morrow, I think.

Q. 286. When was Morrow north of the river?

A. In the summer of 1897.

Q. 287. About what time?

A. I don't remember in the round-up season.

Q. 288. Did you see him there?

A. I saw him there; have been in his tent and ate at his camp.

Q. 289. I understand you to say that the price of stock cattle on the ranges is governed by the prices of beef on the Chicago market, is that correct?

A. To a certain extent.

Q. 290. To how great an extent is that true?

A. It is true to this extent that a man buying cattle generally buys for breeding purposes, and to raise for the Chicago market, and other markets where he can sell them; and the Chicago market being the biggest market in the world, governs the price as to beef cattle.

Q. 291. Don't the Chicago market fluctuate a good deal? A. Yes, sir.

Q. 292. Some months it is higher and some months it is lower?

A. Of course some months it is more and some months it is less.

Q. 293. Now, how do you make this estimate that a rise of two or three dollars per animal in the market raises the price of beef a dollar? I mean range cattle a dollar a head? A. How do I get it?

Q. 294. Yes, by what reasoning do you reach that deduction?

A. Well, in buying a herd of cattle a man will generally get one-third steers and dry cows and the other two-thirds would be stock cattle; it would add about a third then to the value of the cattle of what the rise was. I would figure it that way.

Q. 296. Now, what rise was there in the market for beef from the time you made this contract and November 1st, 1897?

A. There was a gradual rise that season from the time I made that contract up till September anyway. In other words, beef in May when we bought these cattle were selling on the Chicago market for a fairly good price for that season; and in August when we commenced shipping these cattle we commenced getting four or five dollars a head more than we expected out of these cattle. We figured it was a strong market all the way through.

Q. 297. Going to the season of 1898 now, Mr. McNamara, at about what price had beef been in the Chicago market?

A. I am not prepared to say. I haven't noticed the quotations of beef since October. I pay very little attention to the beef market in Chicago except in the month we shipped these cattle.

Q. 298. What months did you usually ship?

A. August, September, and October.

Q. 299. Take it in August, September and October this year; what would be the market prices of good Montana beef?

A. Good Montana beef sold from four cents to four sixty-five—good beef steers—the highest market since I have been in the business.

Q. 300. You say that no cattle man buys stock except in the spring of the year?

A. Well, they buy them at any time of the year for spring deliveries.

Q. 301. That is what you mean to be understood as saying? A. I think that is what I did say.

Q. 302. It is true that they buy in Oregon, Texas and elsewhere during the winter?

A. For spring delivery.

Q. 303. For spring delivery? A. Yes, sir.

Q. 304. You told Mr. Wallace that cattle had advanced between the time you made this contract and the 21st day of October at least five dollars a head?

A. Yes, sir.

Q. 305. Had there been a corresponding advance in the beef market in Chicago between those dates?

A. No, sir; there had not.

Q. 306. Then this advance was independent of the market?

A. Not exactly independent of it. It was occasioned by the shortage of stock cattle and a great rush of people from the east to buy she cattle to keep breeding with.

Q. 307. Do you know of any sales being made at the time you purchased these cattle of other parties?

A. I know some sales that could have been made.

Q. 308. Do you know of any sales that were made?

A. No, sir.

Q. 309. Between that time and October 21st do you know of any other sales being made by other persons?

A. I don't quite understand your question, Judge.

Q. 310. Between May 27th and October 21st, 1897, do you know of any sales having been made by other parties of stock cattle?

A. No, sir; I have none in my mind now.

Q. 311. During the season of 1898 prior to November 1st, 1898, do you know of any sales being made by other parties of stock cattle?

A. Only by hearsay; I don't know what other people are doing; I heard of sales.

Q. 312. You say that the calves of 1897 that were with this 457 head of cattle were worth about October 21st, \$20.00 a head, do you?

A. Yes, sir; I did say that.

Q. 313. Do you know of any calves being bought or sold about that time?

A. I was offered twenty dollars for those calves.

Q. 314. Didn't you accept it?

A. I did not; no, sir.

Q. 315. When were you offered twenty dollars for them? A. About the 15th day of November.

Q. 316. By whom?

A. By a gentleman that lived in Illinois. He came up there to buy several carloads and made me an offer of twenty dollars.

Q. 317. Those same calves when a year old in the following spring would be worth \$21.00?

A. Yes, sir.

Q. 318. What would it cost to winter them?

A. Oh, it takes a good deal.

Q. 319. Such a winter as 1897 and 1898 was?

A. Costs about a dollar and a half or two dollars.

Q. 320. How was that winter, Mr. McNamara, with reference to being an average winter or otherwise?

A. It was not an average winter. It was rather a hard winter for feeders. It was a long winter; had bad weather in November and bad weather in March.

Q. 321. Isn't there quite a loss in calves during the first winter as a rule? A. Not if you feed them.

Q. 322. Is there any loss if you feed them?

A. Very slight.

Q. 324. Well, you have had a long experience in the cattle business; what would you say the average loss would be during the winter?

A. Well, I should judge it would be from one to two per cent.

Q. 325. Doesn't the average loss of calves the first winter run as high as from three to five per cent?

A. That is on the range, I think.

Q. 326. That is on the range?

A. Yes, sir; they lose twenty-five per cent on the range.

Q. 327. These calves were all fed you say that winter? A. Yes, sir; they were all fed.

Q. 328. How many of these 457 head would you say you sold during the fall of 1897, or did you sell any of them? A. I didn't sell any of them.

Q. 329. When did you sell any of the 457 head turned over to you by Mr. Knoell?

A. Sold them in June, 1898.

Q. 330. When did Mr. Knoell turn them over to you?

A. Turned them over as soon as he got up to Sandy with them.

Q. 331. When was that?

A. That must have been about the 23d or 24th of October, I guess.

Q. 332. Do you happen to remember how many cattle the firm of McNamara & Marlow turned in in their assessment list of 1897? A. No.

Q. 333. Can you give us an idea about how many?

A. I cannot.

Q. 334. Do you know how many you turned in in 1898?

A. I think something like eight thousand—seven or eight thousand head; I am not positive as to that.

Q. 335. Do you know when the assessment list for 1898 was made? A. No, I don't; I don't remember.

Q. 336. Made in March, wasn't it?

A. I don't know; I paid very little attention to that.

Q. 337. If it was made in March you hadn't bought any cattle between November 1st, 1897, and the time of the making of this assessment list?

A. I don't know anything about the assessment list; I don't know when it was made. That is a part of the business I don't pay much attention to.

Q. 338. Who makes out the assessment list?

A. I generally give it to the bookkeeper—I usually

give the bookkeeper the figures, but aside from that I don't remember the date they were given. I gave him the figures myself.

Q. 339. Now, going back; if 8,000 head were returned for taxation you haven't bought any of that 8,000 between November 1st and the time you made the list, had you?

A. I don't know; I don't know anything about the list; I don't know when the list was made.

Q. 340. Did you buy any cattle between November 1st, 1897, and April 1st, 1898?

A. Between April 1st, and—

Q. 241. Between November 1st, 1897, and April 1st, 1898, did you buy any cattle that were delivered to you?

A. Had no cattle delivered to us; no, sir.

Q. 342. So that in 1898 if you returned 8,000 head of cattle for taxation you had that number of cattle?

A. Should have it.

Q. 343. In that number about what proportion would be cows and yearling calves?

A. In 8,000 head of stock cattle what proportion would be cows?

Q. 344. Yes, sir.

A. I would say one-fourth of the herd would be cows.

Q. 345. One-fourth of the herd would be cows, you think? A. I would say so.

Q. 346. And calves of that year how many?

A. I should think about one-fourth the cows in a herd of stock cattle that size.

Q. 347. This includes calves as well—what proportion would be cows and calves of that year?

A. Well, that is a hard thing to say for me. Some herds of cattle of that size—

Q. 348. No, but I am speaking of your own herd, Mr. McNamara.

A. I should say there would be 2,000 calves with that many cows if they were well cared for and bred right.

Q. 349. Two thousand calves; I think I said one-fourth of the herd. I said I think one-fourth of the herd would be cows.

Q. 350. Well, one-fourth of 8,000 would be how many? Would that be twenty-five hundred? How many cows and calves did you tell Mr. Wallace you had kept up and fed during the winter of 1897 and 1898?

A. I don't know what I did tell Mr. Wallace; I don't remember his asking me the question.

Q. 351. Well, you kept up some cows and calves during that winter in your fields and fed them hay?

A. Yes, sir.

Q. 352. You had three thousand tons of hay that you cut and about twelve hundred tons that you bought?

A. Oh, no.

Q. 353. How much did you buy?

A. Might have been two or three hundred tons.

Q. 354. You didn't buy, then, from a thousand to twelve hundred tons of hay? A. No, sir.

Q. 355. Then you had thirty-three hundred tons of hay put up in the fall of 1897?

A. Oh, some place between twenty-eight hundred and thirty-one hundred a good, strong three thousand tons.

Q. 356. Well, now, how many cattle, about, did you feed hay to that winter?

A. About thirty-five hundred head.

Q. 357. About thirty-five hundred head?

A. About that.

Q. 358. You didn't feed hay to anything except the weak cows and the calves?

A. Fed hay to everything we kept up.

Q. 359. Well, did you feed anything to anything except the weak ones?

A. We fed heifers and weak stock.

Q. 360. And in the spring of the year you didn't have hay enough to carry you through?

A. We bought some hay in the spring.

Q. 361. How much hay did you buy?

A. I think one hundred and five tons, if I remember correctly.

Q. 362. Now, of those four hundred and fifty-seven head, how many are you willing to say were kept up during the winter of 1897 and 1898?

A. There was 300 head of them and possibly more; I think there was more than 300 head of them kept up.

Q. 363. How many of this 457 head was cows?

A. 157 head—there was more than that there was some dry cows—probably 60 or 70 dry cows.

Q. 364. Those you didn't keep up?

A. Some of them we did. This bunch of stock had

been held there for some time; cattle had been getting away and had been caught again.

Q. 365. How long had they been held down there?

A. Well, they had been held down there for 20 days a lot of them. Across the river the cattle got scattered on them and got in the bends of the river most of them.

Q. 366. How many heifers were there in this 457 head about?

A. I don't remember. I classed the cattle when I got them.

Q. 367. How many heifers did you say, Mr. McNamara, two years old and upwards?

A. Oh, there was probably 60 or 70 head; I don't know positively.

Q. 368. Well, did you keep any of those heifers up that winter? A. Some of them.

Q. 369. How many of them?

A. I think nearly all of them. I think we kept all the heifers there was and all the yearling steers.

Q. 370. How many yearling steers were there, about?

A. Well, there was probably 50 or 60, or something like that; possibly something more. I am just guessing at this; I don't know.

Q. 371. Well, there was some bulls in the lot, wasn't there? A. Yes, sir.

Q. 372. How many of those were there?

A. Thirty-three.

Q. 373. What did you do with the bulls?

A. I kept them all up and fed them.

Q. 374. You always kept the bulls up in the winter time anyhow? A. Yes, sir; I kept the bulls up.

Q. 375. Now, what other cattle were there in this 457 head except those we have just been talking about, the 156 cows, 70 heifers and the bulls? There were some two year old steers, weren't there?

A. Yes, sir.

Q. 376. How many of those?

A. I don't know; they were just a common herd of stock cattle and nothing in there except cows; I couldn't say what they were without looking it up.

Q. 377. Then of the 457 head you think you fed at least 300 head that winter?

A. I am positive there was 300 fed out of that number.

Q. 378. Now, what of those 457 head that you afterwards turned in on your beef contract could you not have supplied from your own herd in 1898?

A. I don't know as I quite understand the question.

Q. 379. Well, I will give it in another way. What of the 457 head of cattle that we have been talking about did you turn in on your beef contract in 1898?

A. I turned in dry cows out of it.

Q. 380. How many?

A. All that there was.

Q. 381. How many were there?

A. I don't know how many there were.

Q. 382. Can you tell about how many?

A. Probably forty or fifty.

Q. 383. Now, were there not in your own herd more than that number of dry cows?

A. This was my own herd.

Q. 384. Yes, but had you not in addition more than that number in your own herd? A. Yes, sir.

Q. 385. What else did you turn into your contract?

A. All the yearling and two year old heifers.

Q. 386. Do you remember how many there were of those? And heifer calves?

A. Yes, I remember exactly how many there were.

Q. 387. After you had turned these heifer calves in, about how many of the same class of cattle had you remaining in your herd?

A. Lots of them, probably a thousand.

Q. 388. What else of this 457 head did you turn into your Indian contract?

A. I turned them all in pretty near but the cows and the one and two year old steers; all the heifers were turned in and all the heifer calves.

Q. 389. All the bulls were turned in?

A. All the bulls were turned in.

Q. 390. Did you have any bulls left after you had turned in your thirty-three head?

A. Well, the contract didn't call for more than the 33 head.

Q. 391. How many of the bulls did you turn in?

A. We always have bulls to raise calves.

Q. 392. How many bulls did you have after you had turned them into your beef contracts?

A. Probably two or three hundred.

Q. 393. Well, was there any of the 457 head except the dry cows, the heifers and calves and the bulls?

A. I don't think there was.

Q. 394. And all of those you could have supplied out of your own herd if you had not had the 457 head?

A. Not at the price.

Q. 395. Why not?

A. The cattle that I am raising myself are very much better cattle, and consequently on these Indian contracts I confine myself strictly to those N. cattle; I consider my cattle worth two dollars a head more than these N cattle.

Q. 396. Then it would have cost you two dollars a head more to fill these contracts with cattle you raised yourself?

A. No, sir; I couldn't have got the contracts with my own cattle. The contracts have to be bid low to get the contracts. If I had bid two dollars more I couldn't have got the contracts.

Q. 397. Suppose you had got the contracts at low prices and expected to fill it out of this N herd and could not do so, you could have filled the contract with a loss of two dollars a head?

A. Well, about that; from two to four dollars a head.

Redirect Examination.

(By Mr. WALLACE.)

Q. 1. You were asked concerning the drafts for the shipments that ended August 22d or the deliveries that ended August 22d. I think you stated to Judge Cullen

that you mailed the draft from Oswego. Do you recollect in connection with that memorandum as to the talk with Van Blarcum when you were in St. Louis on the 26th of August?

A. Yes, sir; I had that particular draft with me.

Q. 2. Well, did you mail that draft or carry it with you? A. I carried it personally with me.

Q. 3. And delivered it as soon as you got there?

A. Yes, sir.

At this point an adjournment was taken until Monday, January the 30th, 1899, at ten o'clock A. M.

HENRY N. BLAKE,

Master.

January 30th, 1899.

Mr. McNAMARA, recalled, testified as follows:

Direct Examination.

Q. 1. In your cross-examination, in referring to the factors that increased the price of range stock on the Montana range, you spoke of the price of beef in the Chicago market, and you added there were also other factors—you spoke of the purchase of stock by feeders; what did you mean by feeders?

A. Young cattle that people in Nebraska and Illinois would buy for the purpose of feeding for the market.

Q. 2. They were feeding them for what market?

A. For the Chicago market.

Q. 3. These young cattle were bought, taken east and fed, and by the eastern feeders taken to Chicago and sold? A. Yes, sir.

Q. 4. What effect did that have?

A. It made stock cattle very scarce and hard to buy in this country.

Q. 5. Why did it make them scarce?

A. Well, so many people¹ were looking for them for that purpose.

Q. 6. There were not enough cattle to supply that demand—that was the reason? A. Yes, sir.

Q. 7. What effect did that have?

A. It had an effect on the price of all range stock during that year.

Q. 8. What effect, up or down? A. Up.

Q. 9. What other factors were there?

A. On account of the scarcity of stock cattle and the demand for them.

Q. 10. And also the price of beef cattle in Chicago was increased, was it not? A. Yes, sir.

11th Q. Judge Cullen at some length examined you and you had a book of shipments before you, concerning the delivery of the number of head delivered, and when the first lot were delivered and when the second and third, he cross-examined you as to whether there were five drafts and five deliveries. What have you to say as to your ability to give the number of drafts from memory—do you recollect about that?

A. No, sir; I did not assume to give it from memory.

Cross-Examination.

12th Q. What, in the parlance of the range, do you understand by the word "feeder"? Does it apply to the man who purchases the cattle, or to the class of cattle bought?

A. The class of cattle bought, and also the buyers.

13th Q. What class of cattle is denominated feeders?

A. Year olds, two year olds and three year olds.

14th Q. Steers or heifers?

A. Principally steers, but they buy heifers also for feeders, or have in the last two years.

15th Q. Spayed heifers?

A. No, sir. We have bought a good many of them in the last two years on account of the scarcity of stock.

16th Q. When did the market in this class of stock commence?

A. I never knew feeders to come here until 1897. They never came here before, that I know of.

17th Q. Who, if you know, was purchasing feeders in the year 1897 throughout this section of country?

A. I do not know the names of the people purchasing, but I do know that they were purchasing them.

18th Q. Did you sell any stock for this purpose?

A. No, sir; I refused to; I had an opportunity to do so.

19th Q. How many opportunities did you have?

A. I had several.

20th Q. Parties came to your place offering to buy stock?
A. Yes, sir.

21st Q. When was this? A. In '97 and '98.

22d Q. What time in 1897?

A. In the summer time.

23d Q. You say you knew of sales being made, who made sales to these people of feeders?

A. Well, Mr. Mellick made some. I do not remember the names. There were a lot of sales, and lots of people trying to buy who could not buy.

24th Q. All this you know by hearsay, do you?

A. Not exactly; I know it is a fact.

25th Q. Were you present when any sale was made?

A. No, sir; I was not.

26th Q. And you only know it by what you were told?

A. I know there was a general demand for that class of stock. There were people trying to buy them.

27th Q. Do you know of this from people applying to you to purchase?

A. I know from other people and I saw advertisements for them.

28th Q. Where did you see advertisements?

A. In the "Stockgrowers' Journal."

29th Q. That is published in Miles City?

A. No, sir; in Chicago.

30th Q. How early in 1897 did you know of the purchase of this class of stock being made?

A. I don't remember how early; I know in August and September I had opportunities to sell several bunches of cattle of that class.

31st Q. You do not recall any sale made prior to that time?

A. No, sir; not in this section of the country?

32d Q. These people that applied to you, did they make you any offer?

A. They made me offers by the pound, not by the head.

33d Q. What was the offer per pound?

A. Four and four and a half per hundred.

34th Q. That was for one, two and three year old steers? A. Yes, sir; and some heifers.

35th Q. Now, is it not true that aside from the offers made to you, you know nothing about the purchase of feeders except what was told you by other parties and from advertisements?

A. No, I know they were made, but I do not know who they were made by.

36th Q. Do you know to whom they were made?

A. No, sir.

37th Q. Nor what price was paid?

A. I know there was a big demand for that class of cattle all over the State.

38th Q. Do you say there were no purchases of feeders in 1896? A. I do not.

39th Q. Were there any?

A. Not in Montana; that is, I never knew people who wanted cattle of that class of feeders until 1897.

40th Q. In 1898 you say you know there were some sales made? A. I know the demand continued.

41st Q. Do you know of any sales that were made?

A. I know of sales being made.

42d Q. Well, you know nothing only by hearsay?

A. I was not present.

43d Q. Were there any offers made to you in 1898?

A. Yes, sir.

44th Q. For what class of cattle?

A. For that class of cattle.

45th Q. How many offers were made to you?

A. I had one party working with me nearly a month to buy feeders.

46th Q. Did you have any other parties in 1898?

A. Not on the ground.

47th Q. Did he make you any offers for feeders in 1898? A. Yes, sir.

48th Q. What was that offer?

A. Twenty-three and thirty-five per head.

49th Q. Twenty-three and thirty-five?

A. Yes, sir.

50th Q. Twenty-three for yearlings and thirty-five—

A. I wish to correct that twenty-three for yearlings and thirty-three for two year olds.

51st Q. Did you sell any at these prices?

A. No, sir; I did not.

52d Q. Did you sell any beef cattle in Chicago in 1898? A. What class?

53d Q. Beef cattle. A. Yes, sir.

54th Q. How many did you sell? How many that came out of this herd?

A. I cannot tell; I sold all the beef in the herd, but I don't remember how many.

55th Q. Apart from what you received from other cattle out of your own herd, native stock, can you tell what cattle of the N-N brought you?

A. I sold them all in carload lots.

Redirect Examination.

56th Q. Where had the feeders, these men who feed cattle for Chicago, been in the habit of getting supplies of cattle in 1897, if you know, from your own knowledge or from your observation of the market, or your acquaintance with the business?

A. I cannot tell. I know they never bought any in Montana until within the last two or three years.

57th Q. Did the fact that they had come out so far west in 1897 indicate anything to you as to how cattle—from your acquaintance with the market, as to the absence or scarcity as to that class of cattle?

A. It is a known fact that there is a great scarcity of cattle all over Montana and the United States.

58th Q. Would they have come to Montana, and as far west, if it had not been for this scarcity?

(Defendant objects; witness cannot tell whether anybody else would have come so far or not. Sustained.)

A. I don't think they would have come to Montana.

59th Q. You think not?

A. Not if they could have gotten them elsewhere.

60th Q. Now, you were asked by Judge Cullen whether your knowledge as to the purchase of cattle was not from hearsay, or from the offers made you and what you saw in the "Stockgrowers' Journal" of Chicago. I believe you testified in your examination that you had kept track of the market. Now, I want to ask you whether the information which you gave about the demand was obtained in any manner by your general observation of the market for cattle in this country?

A. Yes, sir; it was and the demand people were making in trying to buy here.

61st Q. In your observations what source of information do you seek out to acquaint yourself with the condition of the market, and where do you get your information? Do you utilize offers made to yourself?

A. Certainly.

62d Q. You also utilize what you hear from time to time from other cattle men?

(Defendant objects as leading. Sustained.)

63d Q. I want you to tell all the sources of knowledge that you seek out.

A. Well, so many people were inquiring for cattle and other stock men were holding their cattle higher than heretofore.

64th Q. You learned the reason they were holding them higher?

A. Yes, sir; before 1897 we bought cattle from fourteen to twenty dollars a head and since then we have paid as high as thirty-two dollars for cattle, and I considered that showed quite a rise.

65th Q. The fact of the rise seems to be undisputed, and I want to find out from you what source you went to to find this out?

A. The increased demand for cattle was one.

67th Q. Yes, but where did you learn this?

A. From inquiry to sell or buy.

68th Q. You said you had several opportunities to sell feeders and you did not sell. If you had sold from what source would you have taken the animals?

A. From the stock herd.

69th Q. Would the withdrawal of a large number of a given class from your stock herd have any effect upon the uniform proportion of the herd?

A. It certainly would.

70th Q. Would that have had any effect upon the herd as a stock herd? A. Certainly.

71st Q. Would it increase or decrease its value?

A. Decrease it.

72d Q. Would it be possible to estimate how much the value of the herd as a whole would be decreased?

(Defendant objects; not proper redirect examination. Overruled.)

A. That would depend entirely on what class of cattle were sold out of the herd.

73d Q. Did this feature have anything to do with your refusal to sell feeders from the stock herd?

A. I did not think I was making money enough on them, was the reason I did not sell them.

74th Q. In determining the question as to whether you had gotten your price, would you or would you not have taken into consideration the injury done to the herd as a whole?

A. If I had gotten my price I would have sold them.

75th Q. In determining what your price would be would you have taken into consideration the injury done to your stock herd? A. I certainly would.

Recross-Examination.

76th Q. Mr. McNamara, it was in August and September that you had these offers to buy, was it not—1897?

A. I did not have any offers to buy in September.

77th Q. What month was it? A. It was—

78th Q. You misunderstand me. When was it in 1897 that some one came to you and offered to purchase feeders of you? A. In the summer of that year.

79th Q. What month was it?

A. I don't remember.

80th Q. Did you not say it was in August or September? A. I don't think so.

81st Q. At that time, about, what was the value of the McNamara and Marlow herd as it ran on the range?

A. We had never offered our herd for sale.

82d Q. Do you know what the value was?

A. I don't believe I do.

83d Q. How many feeders parties wanted to purchase of you? A. I had—all I had.

84th Q. How many? A. About two thousand.

85th Q. The reason you did not sell was because you did not get your price? A. Yes, sir.

86th Q. And you would not sell? A. No, sir.

CORNELIUS J. McNAMARA.

Subscribed and sworn to before me this 10th day of February, A. D. 1899.

HENRY N. BLAKE,
Master in Chancery.

Monday Afternoon, Jany. 30, 1899.

FRANK A. FRENCH, a witness called on behalf of the complainants, after being first duly sworn by the master in chancery, testified as follows:

Direct Examination.

(By H. G. McINTIRE, of Counsel for the Complainants.)

Q. 1. State your full name, Mr. French.

A. Frank A. French.

Q. 2. Where do you live now, Mr. French?

A. At Big Sandy.

Q. 3. In the employ of whom?

A. McNamara and Marlow.

Q. 4. Were you in their employ in the fall of 1897?

A. I was.

Q. 5. What was your occupation then—while you were in the employ of Messrs. McNamara and Marlow, in the latter part of the summer or the fall of 1897?

A. I was cooking.

Q. 6. At any particular point in the State, and if so what? A. Yes, sir; at Oswego, Montana.

Q. 7. Were you in that employment in the month of October? A. I was.

Q. 8. And about the 21st, 22d and 23d of that month?

A. Yes, sir.

Q. 9. At the same place? A. Yes, sir.

Q. 10. Are you acquainted with Mr. A. W. Niedringhaus?

A. I am acquainted with a young fellow named Ab. Niedringhaus, if that is him.

Q. 11. Yes, sir; that is the gentleman. Do you remember of any cattle being delivered to McNamara and Marlow by what is called the N. Bar N. outfit, or The Home Land and Cattle Company, in October, 1897?

A. Yes, sir.

Q. 12. About what time of the month?

A. There was some delivered on the 21st and the 22d.

Q. 13. Now, we will return to the 21st, and confine your attention to that. Were you present at any interviews or conversations had between A. W. Niedringhaus and Mr. McNamara, one of the plaintiffs in this action?

A. Yes, sir.

Q. 14. About what time of day did that interview between those two gentlemen occur?

A. It was after dark, I should judge about seven o'clock; somewhere along there.

Q. 15. And where was it that this interview was had?

A. That happened in the cooking tent.

Q. 16. You were cooking at that time?

A. Yes, sir.

Q. 17. Do you remember what that interview was?

A. Yes, sir.

Q. 18. Just state it.

A. Mr. A. W. Niedringhaus came up and demanded a receipt for the cattle that had been delivered.

Q. 19. Delivered when? A. On that day.

Q. 20. Do you know what animals had been delivered that day?

A. I didn't see them counted. I know some were delivered which they shipped to Big Sandy—a train load of stock.

Q. 21. You say he demanded or asked for a receipt?

A. Yes, sir.

Q. 22. What did Mr. McNamara do?

A. He gave him a receipt.

Q. 23. Was anything else said in that talk?

A. No, sir; that was all that was said.

Q. 24. I will ask you whether or not anything was said in that talk with reference to paying for the animals that were delivered that day.

A. No, sir; there was nothing said about paying for the animals one way or the other.

Q. 25. Did you see Mr. McNamara, or either of them, in company with Mr. Niedringhaus?

A. Mr. Niedringhaus stopped there and took supper. That is until some time in the evening.

Q. 26. What did he do when he got through supper?

A. He left the tent and I couldn't say where he went.

Q. 27. Now, when was the next time that you saw these gentlemen together?

A. It was about ten o'clock the next day.

Q. 28. Where did you see them?

A. There in the tent—in the cooking tent.

Q. 29. And what occurred in this second interview?

A. Mr. Niedringhaus came up and asked for a receipt for some cattle that had been delivered that morning.

Q. 30. Asked for this receipt from whom?

A. From Mr. McNamara.

Q. 31. Who else was present in the tent besides Niedringhaus, McNamara and yourself?

A. Mr. Knoell.

Q. 32. And who else? A. Mr. Marlow.

Q. 33. Now, tell us what occurred at this second interview, what did Mr. Niedringhaus say and what was done?

A. Mr. Niedringhaus demanded a draft for the cattle delivered the day before and also for that day.

Q. 34. Did I understand you a minute ago that he also asked for a receipt? A. Yes, sir.

Q. 35. Was this before or after he demanded the draft?

A. He demanded the receipt and then right away after he got it he demanded a draft.

Q. 36. Did he say anything about what he wanted to do?

A. He said he wanted to put them both in the same envelope and send them away, I don't know where.

Q. 37. And after he asked for this receipt and draft what was said to him?

A. Mr. McNamara said Mr. Marlow would figure it out for him.

Q. 38. And what did Mr. Marlow do?

A. Figured up what was coming to him and handed him a piece of paper—handed Mr. Niedringhaus a piece of paper for inspection.

Q. 39. Did you recognize the method of figuring that Mr. Marlow pursued?

A. He reckoned up what was coming to The Home Land and Cattle Company, what they had delivered and the number of undelivered stock at Oswego and the 500 head of horses.

Q. 40. When you speak of the animals that had been delivered what do you mean?

A. These cattle that had been delivered on the 21st and 22d.

Q. 41. Then, as I understand it, Mr. Marlow figured out the animals delivered on the 21st and 22d of October and the 500 head of horses and the undelivered animals?

A. Yes, sir.

Q. 42. What kind of animals were these undelivered?

A. Stock cattle.

Q. 43. Do you remember, Mr. French, what this figuring amounted to, the total of it?

A. It amounted to something like forty seven hundred dollars?

Q. 44. Forty-seven hundred dollars?

A. Forty-seven thousand dollars.

Q. 45. What else did Mr. Marlow do after he figured up the amount of money that was coming to The Home Land and Cattle Company—did he do any other figuring?

A. He deducted the amount of shortage and handed him the money—the difference.

Q. 46. What was the amount of the shortage that he figured out—do you remember that?

A. They were short about thirty-seven thousand dollars.

Q. 47. That was the shortage. Now, what did he do with this difference between the amount coming to The Home Land and Cattle Company and the shortage claimed—what did Mr. Marlow do then?

A. I do not know as I understand you.

Q. 48. Was the shortage as Mr. Marlow figured it coming from The Home Land and Cattle Company, or was there any difference?

A. Yes, sir; there was a difference coming to The Home Land and Cattle Company.

Q. 49. How much, do you remember?

A. Some \$9,675, I think.

Q. 50. Now, with regard to this \$9,675, what did Mr. Marlow do?

A. Tendered him the amount in payment.

Q. 51. How did he tender that amount?

A. Mr. Marlow tendered Mr. Niedringhaus the money.

Q. 52. Was it Mr. McNamara or Mr. Marlow that tendered him the money, the \$9,675? A. Mr. Marlow.

Q. 53. How do you know that amount was tendered or offered to Mr. Niedringhaus?

A. I saw it tendered.

Q. 54. What kind of money was it offered in?

A. United States currency.

Q. 55. Paper money, wasn't it? A. Yes, sir.

Q. 56. How did you arrive at the fact that it was \$9,675 that was tendered, or was it that exact amount that was tendered?

A. Because I counted the money, \$9,700—\$25 more than the amount that was coming.

Q. 57. Did Mr. Niedringhaus take this money?

A. No, sir.

Q. 58. What did he say when it was offered to him?

A. He said he had no authority to make any settle-

ment but was there to receive and forward the draft to the company.

Q. 59. Was there anything else done by Mr. Niedringhaus?

A. He said he would go down and see Mr. H. L. Niedringhaus.

Q. 60. What was afterwards done by Mr. A. W. Niedringhaus?

A. He went down and brought Mr. H. L. Niedringhaus and Mr. Sharp.

Q. 61. Who was present in the tent with Mr. Niedringhaus besides yourself?

A. These same people, Mr. Marlow and McNamara and Knoell.

Q. 62. What occurred in this second interview with Mr. Sharp and Mr. Niedringhaus? What next came up?

A. He introduced Mr. Sharp and informed them that he was representing the company.

Q. 63. Who did he inform?

A. Mr. McNamara and Mr. Marlow.

Q. 64. What did they say to Mr. Sharp, and what did Mr. Sharp say to those that spoke to him?

A. He demanded a settlement for the stock delivered.

Q. 65. That is, Mr. Sharp did? A. Yes, sir.

Q. 66. Now, what did Mr. McNamara or Mr. Marlow say to Mr. Sharp?

A. Tendered the same amount of money that they had to Mr. Niedringhaus.

Q. 67. What did Mr. Sharp do then?

A. He refused to accept it.

Q. 68. Did he say anything why he made this refusal that you recall?

A. I don't know as I understand you.

Q. 69. You said a minute ago that Mr. McNamara & Mr. Marlow tendered this amount of money also to Mr. Sharp and he refused to accept it. Now, when he refused to accept it did Mr. Sharp say anything and if so what?

A. He demanded payment for the whole of the stock cattle that had been delivered.

Q. 70. Now, do you recall any conversation between those gentlemen at the time he made this demand?

A. Mr. Sharp said he didn't propose—or rather that Mr. Niedringhaus said he didn't propose to pay the shortage.

Q. 71. For what reason—did he give any reason?

A. He didn't give any reason that I remember of.

Q. 72. Did he say he didn't propose to pay it or who didn't propose to pay it?

A. He said that Mr. Niedringhaus didn't propose to pay it.

Q. 73. Which Mr. Niedringhaus—did he mention the name? A. Mr. W. F. Niedringhaus.

Q. 74. What was done after this talk and after this tender? What did the gentlemen do as far as you know, Mr. French?

A. From that on the conversation referred to different subjects and soon after they left the tent.

Q. 75. That is all you know about it?

A. Yes, sir.

Cross-Examination.

(By W. E. CULLEN Sr., Counsel for Defendants.)

Q. 1. Mr. Marlow made up a statement, did he? When Mr. Ab. Niedringhaus came into the tent on the evening of the 21st or the morning of the 22d he made up a statement, did he?

A. I don't know as I catch your meaning.

Q. 2. Did Mr. Marlow make a statement in writing on the morning of the 22d when Mr. Ab. Niedringhaus came to the tent alone?

A. He made up some figures; that is all I know; he figured up the difference.

Q. 3. Figured up the difference?

A. Yes, sir.

Q. 4. What were you doing at this time, Mr. French?

A. I was cooking.

Q. 5. Cooking dinner or something?

A. I was cooking dinner. And I was cleaning up the breakfast dishes.

Q. 6. How long was Mr. Marlow in making up this statement?

A. I couldn't say how many minutes he was; not long.

Q. 7. Half an hour?

A. I shouldn't think he was over that.

Q. 8. About that should you think?

A. I should say about that.

Q. 9. During this time where was Mr. Ab. Niedringhaus? A. Mr. Ab. Niedringhaus was there.

Q. 10. Sitting right there? A. Yes, sir.

Q. 11. Was there any talk going on between Mr. Niedringhaus and Mr. Marlow during this time?

A. Not that I recall—nothing more than common conversation.

Q. 12. Well, was there any common conversation between Niedringhaus and Marlow during this time?

A. I couldn't say as to that to be positive what the conversation was.

Q. 13. Did you hear any conversation between Mr. Marlow and Mr. Niedringhaus during this time?

A. Nothing as I can recall.

Q. 14. Now, after Mr. Marlow had finished making this statement what did he say to anybody?

A. He passed the statement to Mr. Niedringhaus, and told him that was the way he figured it up.

Q. 15. Did you look over the statement to see how he had figured it up? A. I did not.

Q. 16. You don't know, then, what he had figured up except just what you heard there in the conversation?

A. Yes, that is all, sir.

Q. 17. Now, did Mr. Niedringhaus make any reply to this statement that Mr. Marlow made that he had figured it up?

A. He said he had no authority to make a settlement.

Q. 18. Said he had no authority to make a settlement? A. Yes, sir.

Q. 19. Did he take the paper and look at it?

A. Yes, sir.

Q. 20. Did he see it?

A. I don't know; he took it up and looked at it; I suppose he saw it.

Q. 21. Did Mr. Marlow make any reply then as to what Mr. Niedringhaus said?

A. He demanded the delivery of the rest of the cattle and horses.

Q. 22. Mr. Marlow did?

A. Mr. McNamara or Mr. Marlow.

Q. 23. One or the other? A. Yes, sir.

Q. 24. Well, which one was it?

A. I think it was Mr. McNamara.

Q. 25. Well, what did Mr. Marlow say to Mr. Niedringhaus when he told him he had no authority to settle?

A. I don't remember what Mr. Marlow did say.

Q. 26. Well, what did he do, if anything?

A. Mr. Niedringhaus said he would go down and see Mr. H. L. Niedringhaus and bring him up there; and he did so.

Q. 27. Then that concluded the interview between Niedringhaus and Mr. Marlow at that time, did it?

A. At that time, yes, sir.

Q. 28. Now, let me see if I understand what took place there; in the first place, Mr. Niedringhaus came in and demanded a receipt, did he? A. Yes, sir.

Q. 29. And Mr. McNamara sat down and gave him a receipt? A. Yes, sir.

Q. 30. And then he demanded pay for the cattle that were delivered that day and the previous day?

A. Yes, sir.

Q. 31. How much did he demand?

A. I don't know how much the amount was.

Q. 32. Didn't you hear him speak any amount?

A. No, sir.

Q. 33. Did he produce the receipts there?

A. Who produce the receipts?

Q. 34. Ab. produce the receipt he had taken the day before and the receipt Mr. McNamara had just given him? Did he have them in his hand?

A. He had one. I couldn't swear whether he had more or not.

Q. 35. Then he demanded the pay from Mr. McNamara, didn't he—this draft?

A. Well, Mr. McNamara and Mr. Marlow was both sitting on one side of the table and Mr. Niedringhaus on the other; I couldn't say which he demanded it of.

Q. 36. What did he say he wanted to do with it?

A. He said he wanted to put the draft in an envelope and send it with the receipt.

Q. 37. Well, who said anything in response to that, in reply to what he had just said—anyone?

A. Mr. McNamara said Mr. Marlow would figure it up.

Q. 38. And then Mr. Marlow commenced figuring it, did he? A. He did.

Q. 39. Was anything said between Mr. Niedringhaus and Mr. McNamara and Mr. Marlow before he commenced figuring? Anything at all said?

A. Not that I recall.

Q. 40. What did Mr. Marlow use to get these figures from—did he use anything?

A. I don't understand the question.

Q. 41. Where did Mr. Marlow get the figures that he put into the statement—this data?

A. He took the amount of cattle that had been delivered.

Q. 42. Well, what did he have to show the amount of cattle that had been delivered, these receipts?

A. He had some books there by the side of him; I couldn't say what was in them.

Q. 43. You didn't look at them? A. No, sir.

Q. 44. Was Mr. Marlow looking at them when he was making this statement out?

A. I couldn't say as to that.

Q. 45. You say it took him about a half an hour to make out that statement?

A. I said it took him from twenty minutes to a half hour.

Q. 46. What sort of paper was it on?

A. It was on writing paper.

Q. 47. About what size?

A. It was on a sheet of paper about letterhead size—like that there (witness pointing to a letterhead lying on the table.)

Q. 48. It was the size of a letter sheet of paper?

A. Yes, sir.

Q. 49. You don't recall what took place between Mr. Niedringhaus and Mr. McNamara and Marlow unless there might have been some common conversation?

A. That is what I would call it—common conversation. I didn't pay any attention to it at all.

Q. 50. After Mr. Marlow had finished this statement what did he do with it?

A. Passed it to Mr. Niedringhaus across the table.

Q. 51. Right across the table? A. Yes, sir.

Q. 52. Did he say anything when he passed it over?

A. I cannot recall the words. He said that is the way I figure it out how we stand.

Q. 53. And Mr. Niedringhaus took it up did he and looked at it? A. Yes, sir.

Q. 54. And then what did he say?

A. Well, sir, he said he had no authority to make a settlement. All he was to do was to take receipts and deliver them and get drafts for the cattle.

Q. 55. Well, did Mr. McNamara or Mr. Marlow say anything in response to that?

A. They passed him over the paper showing the difference.

Q. 56. What else did they do?

A. Produced the money and tendered it to him for the cattle.

Q. 57. Well, did they say anything about it, telling what the money was for or anything of that sort? Did they say anything that you recall at all, Mr. French?

A. Well, said that made a difference of \$9,675 and there is the cash.

Q. 58. What did Mr. Niedringhaus say to that?

A. He said he had no authority to make a settlement.

Q. 59. He had already said that when the paper was passed over to him?

A. Well, at that time he said he would go down and see Mr. H. L. Niedringhaus.

Q. 60. He left the tent did he? A. Yes, sir.

Q. 61. How long was he gone?

A. Probably twelve or fifteen minutes; something like that.

Q. 62. Now, when was it that you counted this money—while he was gone?

A. No, sir; I counted the money as soon as they got over the conversation.

Q. 63. Well, was Mr. Niedringhaus there?

A. No, sir.

Q. 64. Well, it was after he was gone, was it?

A. Yes, sir.

Q. 65. Well, when was it that you counted the money?

A. When they had all left the tent except Mr. McNamara and Mr. Marlow and Knoell.

Q. 66. The second time? A. Yes, sir.

Q. 67. How long did it take you to count the money?

A. Well, I am a pretty poor counter; it took me some time.

Q. 68. What size bills were they?

A. There was one bunch, if I remember correctly, containing fifty dollar bills; the other was a mixed bunch.

Q. 69. Of what denomination?

A. Well, there was one five hundred dollar bill and the rest smaller.

Q. 70. What was the smallest and what was the largest except the five hundred dollar bill??

A. I couldn't say.

Q. 71. Was there any five dollar bills among them?

A. I couldn't say whether there was or not.

Q. 72. Any national bank currency among them?

A. I didn't look to see what they was.

Q. 73. You just looked to see if it was money?

A. Yes, sir.

Q. 74. You didn't look to see if any of it was counterfeit or not? A. No, sir.

Q. 75. Now, Mr. French tell us what occurred after Mr. H. L. Niedringhaus and Mr. Sharp returned?

A. He came back into the tent with Mr. Niedringhaus and Mr. Sharp and said Mr. Sharp is representing the company.

Q. 76. Now, who was in the tent at that time?

A. Mr. McNamara, Mr. Marlow, Mr. Knoell and myself.

Q. 77. How long had Mr. Niedringhaus been gone?

A. Something like twelve or fifteen minutes.

Q. 78. Now, what response, if any, or reply, if any, was made by either Mr. McNamara or Mr. Marlow to this statement that Mr. Sharp was representing the company or was anything said by either of them?

A. They recognized the statement made by Mr. Niedringhaus.

Q. 79. Well, what did they say?

A. They made some proposition to them—

Q. 80. Well, what did either Mr. McNamara or Mr. Marlow say, and which one said it?

A. I don't remember what was said.

Q. 81. Cannot tell what was said? A. No.

Q. 82. Where had this statement—this written statement which Mr. Marlow had made up been in the meantime while Ab. was gone? A. On the table.

Q. 83. Ab. didn't take it with him? A. No, sir.

Q. 84. Either of them?

A. I saw it there while he was gone; I don't think he took it.

Q. 85. Could not have mistaken that for another piece of paper? A. No, sir.

Q. 86. Now, don't you remember that Mr. A. W. Niedringhaus came in and pulled that piece of paper out of his pocket? A. No, sir; I don't.

Q. 87. Well, you remember what Mr. Sharp said when they called their attention to the statement?

A. They said they didn't propose to pay this shortage.

Q. 88. They didn't propose to pay it—that is what they said, is it? A. Yes, sir.

Q. 89. Give any reason for not proposing to pay it?

A. Yes, sir; they said they were going to get the rest of the cattle that fall.

Q. 90. To make up the shortage? A. Yes, sir.

Q. 91. Well, what did Mr. McNamara and Mr. Marlow say about that?

A. They asked him how they were going to do it without any horses or men.

Q. 92. What did he say?

A. I don't remember what he said.

Q. 93. Did he make some reply to it?

A. He said they had plenty of time to round them up, from then till the beginning of November.

Q. 94. Well, what further took place?

A. Mr. McNamara and Mr. Marlow demanded the delivery of the rest of the cattle and horses.

Q. 95. Did they say they would deliver them—did Mr. Sharp say he would deliver them?

A. He said he would deliver them provided they would pay for what had been delivered them and also for the horses and the rest of the cattle.

Q. 96. What was said to them by Mr. McNamara and Mr. Marlow—anything?

A. Nothing except the same proposition as before.

Q. 97. That they would settle according to that statement? A. Yes, sir.

Q. 98. How long did this conversation between Mr. Sharp and Mr. McNamara and Mr. Marlow take—how long a time did it occupy?

A. I should say somewhere about three-quarters of an hour.

Q. 99. And is that all that took place in that three-quarters of an hour that you have narrated? Have you told all that took place in that three-quarters of an hour between those men, Mr. French?

A. Yes, sir; all that I recall.

Q. 100. You were busy all of this time with your duties cooking your lunch and getting it ready, weren't you? A. All the time that was required of me.

Q. 101. Well, it required pretty much all of your time didn't it? A. No, sir.

Q. 102. What part of the time were you unoccupied of this three-quarters of an hour? Weren't you busy all the time that Sharp was in the tent?

A. No, sir.

Q. 103. You were not? A. No, sir.

Q. 104. Do you remember what you were doing while Mr. Sharp was in the tent—were you working about your cooking business?

A. Wasn't doing much cooking because they were right in my way.

Q. 105. Did you have anything on cooking at that time?

A. I believe I had some meat boiling and some vegetables.

Q. 106. And you just stood there and listened to the conversation during the entire three-quarters of an hour, did you?

A. I didn't say that long; somewhere about that long.

Q. 107. And that is all that you recall that occurred between those gentlemen at that time, is it?

A. All I recall.

Q. 108. Any of the parties seem to be anyways angry, any dispute or quarrel, or anything of that kind?

A. No, sir.

Q. 109. Everything seemed to be pleasant?

A. Yes, sir.

Q. 110. Did you hear Mr. Sharp make any demand for

this money for pay for the cattle that had been delivered that day and the day before? A. Yes, sir.

Q. 111. What did he say?

A. He said he wanted the drafts for the cattle that had been delivered.

Q. 112. This was Mr. Sharp that said this?

A. Yes, sir.

Q. 113. What did Messrs. McNamara and Marlow say, if they or either of them said anything to this?

A. They made this proposition.

Q. 114. Did they say they would or would not pay him for the cattle that had been delivered the day before or on that day? Did they say they would pay him for the cattle that was delivered that day and the day before?

A. They said they would if they delivered the horses and the rest of the cattle.

Q. 115. Just according to that statement?

A. Yes sir.

Q. 116. Now, independent of the statement had they refused to pay him for the cattle that was delivered that day and the day before? A. I couldn't say.

Q. 117. Don't you recall that they emphatically did say so? A. I don't recall.

Q. 118. You don't recall it? A. No, sir.

Q. 119. Now, in order to refresh your recollection, don't you recollect that they did refuse to do it and Mr. Sharp said they had broken their contract, or something to that effect? A. I don't remember.

Q. 120. Do you remember anything that was said about a breach of the contract in your presence there that day by either side? A. No, sir; I do not.

Q. 121. You didn't hear anything of that kind said?

A. No, sir; I didn't hear anything said about a breach of the contract.

Q. 122. Now, the night before Mr. Ab. Niedringhaus took supper in your tent, did he? A. Yes, sir.

Q. 123. Where was Mr. Sharp and Mr. H. L. Niedringhaus?

A. I don't know anything about that; they didn't come near the tent.

Q. 124. When did you first see those two gentlemen there, Mr. French? A. Which gentlemen?

Q. 125. Mr. Sharp and Mr. H. L. Niedringhaus?

A. I don't know what time I saw Mr. H. L. Niedringhaus; it was some time during the summer.

Q. 126. Well, but on this occasion had you seen them before Mr. Ab. Niedringhaus brought them up to the tent? A. No, sir; I had not.

Q. 127. How long before supper was ready that Mr. Ab. Niedringhaus had got this receipt for the cattle that was delivered that day?

A. Supper was all ready but the men were not ready to eat it. As quick as they were ready they got supper after the receipt.

Q. 128. Do you remember what he said to Mr. McNamara when he asked for the receipt?

A. He simply said he would take a receipt for the cattle.

Q. 129. Didn't he say, "I will not ask you for a draft to-day, but I want a receipt for the cattle that have been delivered"?

A. There was nothing said that I heard about a draft at all; he just simply asked for a receipt.

Q. 130. Nothing said about a draft that you heard?

A. No, sir.

Q. 131. Well, had you heard all that passed between these men about it? A. Yes, sir.

Q. 132. The whole conversation took place inside the tent? A. Yes, sir.

Q. 133. Had Mr. McNamara and Mr. Niedringhaus come there together to the tent? A. I think not.

Q. 134. You think Mr. McNamara came first, do you?

A. Yes, sir.

Q. 135. How long had he been there before Mr. Niedringhaus put in an appearance?

A. Oh, a short time; but a very few minutes.

Q. 136. They had been out where these cattle were being delivered up at the cattle yards, hadn't they—up at the stockyards?

A. I suppose they had; I wasn't up there.

Q. 137. And you think Mr. A. W. Niedringhaus came to the tent a few minutes afterwards?

A. Yes, sir.

Q. 138. Well, when Ab. came in what was the first thing he said? A. I don't recall what he did say.

Q. 139. You don't, Mr. French, pretend to recall any conversation except in a general way that was had there on these occasions, do you—you don't pretend to repeat the language that every party used, do you?

A. I don't understand what you mean.

Q. 140. Well, I have repeatedly asked you what Mr. McNamara said and what Mr. Niedringhaus said, and in each case you don't seem to be able to do it; you state generally what you understood to be the purport of the conversation between them, but not the language used; is that not true?

A. I don't recall the exact words of any talk they used there.

Q. 141. No, that is what I thought. When he asked for a receipt did Mr. McNamara make any reply to him at all, or did he just turn around and write out the receipt?

A. He says, "All right," and went on and wrote the receipt.

Q. 142. Nothing said between them in your presence about the number of cattle the kind or anything of that sort? A. No, sir.

Q. 143. Well, that is all that took place there except with Mr. Ab. at supper?

A. Well, during supper they spoke about the train pulling out for Chicago.

Q. 144. Had the train pulled out for Chicago?

A. It did while they were eating supper, and they said there the train has gone to Chicago.

Q. 145. Well, how did it happen that Mr. Niedringhaus took supper there?

A. I don't know; he often took supper there.

Q. 146. Anybody invite him to do it?

A. I think he was invited there.

Q. 147. Where did he board?

A. Lived at the ranch—the N-N ranch.

Q. 148. After supper did he return to the ranch that night? A. I don't know, sir.

Q. 149. Where did he go to?

A. He said he stopped at Jack Caldwell's.

Q. 150. The storekeeper at Oswego?

A. Yes, sir.

Redirect Examination.

Q. 1. When you gave these estimates of time to Mr. Cullen, a half hour in one instance and three-quarters of an hour in another to a question of his, you don't pretend to say accurately, do you? A. No, sir.

Q. 2. You didn't look at your watch, did you?

A. No, sir.

Q. 3. It is just a guess? A. That is all.

FRANK A. FRENCH.

Subscribed and sworn to before me this 31st day of January, 1899.

HENRY N. BLAKE,
Master in Chancery.

HERMAN KNOELL, a witness called on behalf of the complainants, after being first duly sworn by the master, testified as follows, to wit:

Direct Examination.

(By Mr. H. G. McINTIRE, of Counsel for the Complainants.)

Q. 1. What is your business, Mr. Knoell?

A. Cattle business; cow-punching, as they call it.

Q. 2. How long have you been in the cattle and cow-punching business?

A. Oh, about sixteen or seventeen years.

Q. 3. At present who are you working for?

A. McNamara and Marlow.

Q. 4. Where were you working, and for whom were you working in the year 1897?

A. Mr. McNamara and Mr. Marlow.

Q. 5. At what particular place in the State?

A. At Oswego, in Montana.

Q. 6. Do you know anything about the delivery of cattle by what is called The Home Land and Cattle Company, or the N. Bar N. Cattle Company to McNamara and Marlow? A. Yes, sir; I do.

Q. 7. Do you know anything about deliveries made by that company to McNamara and Marlow in October, 1897? A. Yes, sir.

Q. 8. What time were such deliveries made?

A. I remember October 21st and 22d.

Q. 9. Do you remember what kind of animals and what number were delivered on the 21st day of October?

A. Yes, sir.

Q. 10. Please tell us.

A. 626 head of steers delivered there.

Q. 11. And you say there was another delivery on the 22d? A. The 22d, yes, sir.

Q. 12. What was the number of that delivery?

A. 307 head.

Q. 13. About what time of the day on the 22d was

this number of cattle delivered—this 307 head, Mr. Knoell? A. Delivered in the morning.

Q. 14. Do you know when the delivery was completed? That is, how long it took to deliver them—what time it was?

A. Oh, it was about eight or nine o'clock when it was over.

Q. 15. This 307 head, in what way were they delivered? How were they turned over?

A. They were cut out and counted to McNamara and Marlow.

Q. 16. And what did McNamara and Marlow do with the 307 head?

A. Received them, and sent them to the agency.

Q. 17. What agency? A. Poplar.

Q. 18. Poplar Agency? Were any further deliveries of cattle made on October 22d after the receipt of this 307 head? A. No.

Q. 19. After the 307 head were delivered, what did you people do, where did you go?

A. After they were delivered, we all went to our tent and stayed in there.

Q. 20. You know A. W. Niedringhaus—was he there?

A. No, he wasn't there.

Q. 21. When did he come in?

A. He came in very shortly after we got in there.

Q. 22. Do you know what time of the day he came in there?

A. Nine o'clock; between nine and ten o'clock; something like that, I should say.

Q. 23. Who came in with him?

A. He came in alone.

Q. 24. When he came into the tent, who was present in the tent?

A. Mr. McNamara and myself and Mr. French.

Q. 25. Anybody else?

A. No, sir. Yes, sir; Mr. Marlow was in there too.

Q. 26. Anybody else? A. No, sir; nobody else.

Q. 27. You four were there, and then Mr. Niedringhaus came in; now, do you know what occurred when Mr. Niedringhaus came into the tent?

A. Yes, sir; a receipt for the cattle was turned over that morning.

Q. 28. 307 head?

A. Yes, sir; 307 head.

Q. 29. Did you hear who he asked the receipt of?

A. Yes, sir; Mr. McNamara.

Q. 30. What did Mr. McNamara do when he asked for the receipt?

A. Mr. McNamara wrote out a receipt and handed it to him.

Q. 31. Was anything said to Mr. Niedringhaus after he got the receipt, if you know?

A. He asked for drafts for the cattle that were delivered that day, and the day before also.

Q. 32. Whom did he ask this of?

A. He asked Mr. McNamara.

Q. 33. And what did Mr. McNamara do—or did he say what he wanted to do with this draft?

A. Yes, sir; he told them he wanted to send them off.

Q. 34. You say "them"; what did he mean by "them"?
Did he ask for two drafts or one?

A. He said he wanted to send them off for the cattle.

Q. 35. What papers did he want to send off?

A. Wanted to send off drafts for the cattle.

Q. 36. What did Mr. McNamara say to him, when he asked for drafts for the cattle?

A. He told him Mr. Marlow would figure it out, and settle with him.

Q. 37. Turned him over to Mr. Marlow did he?

A. Yes, sir.

Q. 38. Now, after Mr. Niedringhaus was turned over to Mr. Marlow, what did Mr. Marlow do?

A. Mr. Marlow figured up the cattle that was delivered on the 21st and 22d, and also what they were holding 457 head, and 500 head of horses. He figured it up.

Q. 39. Did he figure up anything else?

A. He figured up the strays.

Q. 40. Do you remember approximately what this amount figured up to Mr. Knoell? A. Yes, sir.

Q. 41. Well, tell us what it was. A. \$47,575.00.

Q. 42. What else did Mr. Marlow figure up, if you know? A. He also figured up the shortage.

Q. 43. Mr. Marlow claimed a shortage then, did he?

A. Yes, sir.

Q. 44. Do you remember how much of a shortage Mr. Marlow figured up in this statement?

A. Not exactly, I don't; something like 1,900 head of cattle.

Q. 45. And what did Mr. Marlow then offer to do to Mr. Niedringhaus?

A. There was a difference of \$9,765.00 which he hadn't paid Mr. Niedringhaus, after everything was figured up.

Q. 46. He offered to pay Mr. Niedringhaus the difference, did he? A. Yes, sir.

Q. 47. You saw him make this offer?

A. Yes, sir.

Q. 48. How did he make the offer?

A. Offered it to him in money.

Q. 49. Count out the money to Mr. Niedringhaus?

A. It was all in a bundle there.

Q. 50. Handed it over to him? A. Yes, sir.

Q. 51. Did Mr. Niedringhaus take it?

A. No, sir.

Q. 52. Did he give any reason for not taking such an enormous sum of money?

A. He said he couldn't settle with him that way; he didn't have no authority to.

Q. 53. He wouldn't take the \$9,675.00?

A. No, sir.

Q. 54. Well, did he say anything else about what he would do, or anything of that kind?

A. He said he would have to get Mr. H. L. Niedringhaus.

Q. 55. After he said this, what did Mr. A. W. Niedringhaus do?

A. He went down after Mr. H. L. Niedringhaus and brought him and Mr. Sharp up there.

Q. 56. Were you in the tent when they came up there?

A. Yes, sir.

Q. 57. What was said when Mr. Sharp was brought into the tent?

A. Mr. Niedringhaus introduced Mr. Sharp to them, and said he would take care of the business for them.

Q. 58. What did Mr. Sharp do?

A. He demanded payment for the cattle that had been received that day and the day before.

Q. 59. What did Mr. McNamara and Mr. Marlow say?

A. Offered them the sum of money—the same money that they had offered to Mr. Niedringhaus before.

Q. 60. What did Mr. Sharp say to that?

A. He said he couldn't take it; wouldn't accept it.

Q. 61. Did he give any reasons why he wouldn't accept it?

A. He said that Mr. W. F. Niedringhaus refused to pay for any shortage, and couldn't settle.

Q. 62. Mr. Sharp said that Mr. W. F. Niedringhaus wouldn't pay any shortage? A. Yes, sir.

Q. 63. That is what Mr. Sharp said?

A. Yes, sir.

Q. 64. Was anything else said?

A. Mr. McNamara offered to bet him a suit of clothes that Mr. W. F. Niedringhaus didn't say that.

Q. 65. In other words, Mr. McNamara bluffed Mr. Sharp with a suit of clothes? A. Yes, sir.

Q. 66. Did Mr. Sharp call the bet? A. No, sir.

Q. 67. Then what else occurred—what did Mr. Sharp say after that?

A. Well, they were talking about one thing and another, just every-day matters. Just a conversation of different kinds.

Q. 68. Mr. Sharp also refused this money?

A. Yes, sir.

Q. 69. Was it offered to him? A. Yes, sir.

Q. 70. It was offered to him also? A. Yes, sir.

Q. 71. The same sum of money that had been offered to Mr. Niedringhaus was offered to Mr. Sharp?

A. Yes, sir.

Q. 72. And he refused it also? A. Yes, sir.

Q. 73. Now, after this refusal, was anything said to those gentlemen by Mr. McNamara or Marlow, or either of them, as to the delivery of the animals still on hand?

A. Yes, sir; they demanded the balance of the cattle that were being held, and also the saddle horses.

Q. 74. And what did these gentlemen say to them?

A. They said they would bring them in and turn them over, provided they would give them a draft as they turned them over.

Q. 75. Did they say they would turn these animals over, if they were paid for, or did they insist on having them all paid for?

A. They insisted on them paying for everything.

Q. 76. Before they would turn over the 457 head, and the 500 head of horses? A. Yes, sir.

Q. 77. Well, after they got through with this little controversy or talk, what did Sharp and A. W. Niedringhaus and H. L. Niedringhaus do?

A. They didn't do anything, stayed around there for a while, and then kind of drifted off and scattered around in different places.

Q. 78. Was anything said about the 457 head of cattle that was still remaining undelivered on the outside?

A. They remained outside, and the saddle horses were all put into the yard.

Q. 79. What was done with the saddle horses after they were put into the yard, as to ascertaining what number was there?

A. Well, they counted them out; counted out 500 head.

Q. 80. Who counted them?

A. Mr. McNamara and Mr. Marlow and I.

Q. 81. Are you the only people that did the counting?

A. Blackmon of the other side also counted.

Q. 82. Well, why was this counting done?

A. Well, they were to have five hundred head of horses.

Q. 83. And were there enough horses to make up 500 head?

A. There was to be seven hundred head of them, and they were to take out 500 head of them.

Q. 84. How many horses did they have to take the 500 head from? A. About six hundred head.

Q. 85. They left a surplus then, did they, after they had got their 500 head out? A. Yes, sir.

Q. 86. What was done with them?

A. Put in a different pen.

Q. 87. What kind of animals were they in this different pen? A. Old, broken-down cow horses.

Q. 88. In order to get these 500 head and some odd, what did the boys have to do with these horses?

A. Turned in everything they had; the boys that were working unsaddled their horses and turned them into the pen.

Q. 89. Now, after the cattle and these horses were counted, was there another interview between Sharp and Marlow, and McNamara and A. W. Niedringhaus, or any of them? A. Yes, sir; there was.

Q. 90. Tell us what that interview was?

A. Well, they wanted pay for the horses right there; and then Mr. McNamara and Marlow told them if they would bring the cattle in, they would settle for the whole business.

Q. 91. What did McNamara and Marlow do then with reference to paying for any of the animals?

A. They offered them the same money that they had before.

Q. 92. Tendered the money again, did they?

A. Yes, sir.

Q. 93. Did they request these gentlemen, Sharp and Niedringhaus, to go ahead with the contract at that time? A. Yes, sir; they did.

Q. 94. What did Sharp or Niedringhaus say in that regard?

A. Said they wouldn't turn anything over unless they gave a draft for what was turned over.

Q. 95. In other words, they wanted a draft before they turned over the animals?

A. Looked that way.

Q. 96. Who was the foreman or ranch boss of the defendant cattle company, Mr. Knoell?

A. Loss Blackman.

Q. 97. You know Loss Blackman, do you?

A. Yes, sir.

Q. 98. Had you had any talks or conversations with Mr. Blackman prior to this delivery on October 21st, with reference to the delivery? A. Yes, sir.

Q. 99. What did he say with reference to that delivery?

A. He said that they were ready to make a final delivery of the cattle on the 21st.

Q. 100. How long before the 21st was it?

A. Something like four or five days.

Q. 101. Said what there would be in that delivery?

A. Yes, sir; horses and everything.

Q. 102. Do you know what the defendant company had done with its various outfits that it had on on these round-ups, or subsequent to that time?

A. Which?

Q. 103. This talk was about the three or four days before the 21st of October, was it? A. Yes, sir.

Q. 104. This talk with Blackman?

A. Yes, sir.

Q. 105. Now, were there any indications around there pointing to the fact that they had finished their round-up that year? A. Yes, sir.

Q. 106. What were they?

A. They had pulled in two or three wagons, and there was a wagon there holding the cattle on the north side at Oswego. They had turned the cattle over to them.

Q. 107. This wagon on the north side was still out?

A. Yes, sir.

Q. 108. They had brought in their other wagons, had they?

A. Yes, sir; they had paid off the men and let them out, and turned the saddle horses into the pasture and stowed the wagons away.

Q. 109. Is it customary in the cattle business, if you are still going on the round-up, to turn your horses into the pasture? A. No, sir.

Q. 110. Why not?

A. Because that shows that they are through work.

Q. 111. How does that show that the men are through work, from a cattleman's standpoint?

A. Well, they had pulled the wagons off and paid the men off, and the men had left there. They had turned the saddle horses into the pasture. They wouldn't turn them out if they had to make another round-up.

Q. 112. In other words, in the conduct of the cattle business each wagon that goes out on the range on a round-up has a number of horses to itself?

A. Yes, sir.

Q. 113. And it takes a good many horses, doesn't it?

A. Yes, sir.

Q. 114. What is the usual number of men and horses usually taken along with one wagon?

A. Ten, twelve or fifteen men with a wagon, and 110, 120 or 150 head of horses.

Q. 115. You are acquainted with the neighborhood of Oswego and where this N. Bar N. range is, aren't you, Mr. Knoell? A. Yes, sir.

Q. 116. Is it customary to have round-ups on that range there after October 21st?

A. No. As a general rule, everybody is through by that time. It is pretty late in the season.

Q. 117. In this year of 1897, who had been working that range there, outside of the defendant cattle company?

A. The Circle Diamond and the Sieben outfit.

Q. 118. What had become of these two outfits?

A. They had all quit work; were through for the season.

Q. 119. In working a range, it is customary for several outfits to work together, isn't it?

A. Yes, sir.

Q. 120. Do you know how many wagons The Home Land and Cattle Company had on the round-up of 1897?

A. Yes, sir; they had six.

Q. 121. And on or about October 21st, 1897, do you know how many had been brought in?

A. They had all been brought in then.

Q. 122. There was one outfit on the north side of the river, wasn't there, Mr. Knoell?

A. They were still holding those cattle closely.

Q. 123. Yes, but all the wagons with the exception of Caldwell's had been brought in?

A. Yes, sir; laid off—through.

Q. 124. And the Caldwell outfit were doing what?

A. Holding these cattle to turn over.

Q. 125. You wouldn't call that a round-up outfit?

A. No, sir; they was through rounding-up.

Cross-Examination.

(By Mr. W. E. CULLEN, of Counsel for the Defendant.)

Q. 1. How long prior to the 21st day of October, 1897, had you been down to the N. Bar N. ranch, Mr. Knoell?

A. Not a great many days before that. Something like six or seven days.

Q. 2. The wagons were not in at that time?

A. Some of them.

Q. 3. How many were in?

A. I think there was three or four wagons got in. Three or four wagons.

Q. 4. They had been in and gone out again?

A. No, sir; the wagons with all the men were paid off, and the men had left the country.

Q. 5. Horses in the pasture? A. Yes, sir.

Q. 6. Mr. Caldwell, you say was holding the cattle?

A. Yes, sir.

Q. 7. He was there holding the cattle or something?

A. The biggest part of the summer he was rounding up.

Q. 8. He did round-up some then, did he?

A. Yes, sir.

Q. 9. What country did he work?

A. He worked the north side of the river up towards the line.

Q. 10. Who assisted him?

A. Well, he had a number of men.

Q. 11. Well, wasn't there any other outfit there besides Caldwell's outfit?

A. Yes, sir; there was another outfit there that took cattle from Caldwell as he was rounding them up.

Q. 12. Who was that? A. Len Morrow.

Q. 13. Well, what other outfits were there on that round-up on the north side of the river?

A. The Circle Diamond and Sieben's outfit.

Q. 14. That was on the north side? A. Yes, sir.

Q. 15. How about the south side?

A. I didn't know anything about on the south side.

Q. 16. Just only on the north side? That you knew nothing about, did you? A. Yes, sir.

Q. 17. McNamara and Marlow have any cattle in there? A. No, sir.

Q. 18. On the morning of the 22d, what time was it when you started to work, Mr. Knoell?

A. Started to work pretty early.

Q. 19. Well, how early did you get up that morning?

A. Up at five o'clock in the morning; generally had breakfast about five o'clock in the morning.

Q. 20. You had your breakfast about five o'clock?

A. Yes, sir.

Q. 21. How long did you wait there before you started out? A. Not very long.

Q. 22. Who went out to the herd that morning besides yourself?

A. Who went with me to the herd that morning?

Q. 23. The morning of the 22d of October, yes, sir.

A. Mr. McNamara.

Q. 24. Was he the only man?

A. There was Mr. Bob Dye.

Q. 25. Who was he?

A. He was a man working for Mr. McNamara and Marlow.

Q. 26. You three, then, went together?

A. Yes, sir; Mr. Marlow came out there too.

Q. 27. Well, was A. W. Niedringhaus and the N. Bar N. people—where were they, around there some place, do you think?

A. They all come up to the herd after a bit.

Q. 28. You got there before they did.

A. I wouldn't say for certain; they were there a short time after we were, or they might have been there first for all I know about it.

Q. 29. You don't state that positively?

A. No, sir.

Q. 30. Well, now, didn't you wait a while for them there at Oswego before starting out?

A. Not that I know of.

Q. 31. Where was Mr. Blackman?

A. Blackman was around there somewheres.

Q. 32. Where did you first see Blackman that morning?

A. Saw him at the herd first.

Q. 33. You didn't ride out there with Loss, did you?

A. No, sir.

Q. 34. How far from Oswego was it to where the herd was?

A. About two miles, I should judge; mile and a half or two miles.

Q. 35. The herd had been moved down then, had it, the day before?

A. They were holding them in the vicinity there for some time before that.

Q. 36. That is where they had been holding them for some time?

A. Right around there; not quite close.

Q. 37. I thought they had been holding them there within four or five miles of Oswego?

A. Well, they were tallying them and turning them over at that time, and they had moved them down closer.

Q. 38. Now, these were all steers, this 307 head, were they?

A. No, sir; there was cows among them.

Q. 39. How many steers were there?

A. I don't know; I don't remember.

Q. 40. Anything else except steers and dry cows?

A. No, sir.

Q. 41. Were these animals cut out when you got there? A. Were they—

Q. 42. Were they cut out when you got to the herd that morning? A. No, sir; I think not.

Q. 43. Who cut them out?

A. They cut them out, and we helped . . .

Q. 44. After they were cut out they were counted were they? A. Yes, sir.

Q. 45. By whom?

A. By both them and Mr. McNamara and Mr. Marlow.

Q. 46. Any dispute about the number of cattle?

A. None that I heard.

Q. 47. Were they driven between two men, or anything of that sort, Mr. Knoell? A. Yes, sir.

Q. 48. And who did the counting?

A. Mr. McNamara and Mr. Loss Blackman.

Q. 49. What were you doing while they were doing this counting? A. Sometimes I might count.

Q. 50. Do you know whether you counted or not?

A. Yes, sir; I do know.

Q. 51. How many did you count?

A. I counted that number?

Q. 52. Then you counted all the cattle yourself, did you? A. Yes, sir; I did.

Q. 53. Mr. McNamara counted them too?

A. Yes, sir.

Q. 54. Mr. Loss Blackman counted them also?

A. Yes, sir.

Q. 55. Now, who else besides Mr. Loss Blackman was there representing the Lazy N. people?

A. Mr. Ab. Niedringhaus.

Q. 56. Ab. was there, was he? A. Yes, sir.

Q. 57. Did he do any counting, if you know?

A. I don't know, I didn't ask him.

Q. 58. Well, couldn't you see?

A. Well, I couldn't say; he might be counting, for all I knew; a man might stand and count, and you wouldn't know whether he was counting or not.

Q. 59. Well, how do you know that Loss Blackman was counting?

A. Because I heard Mr. McNamara say he was going to count.

Q. 60. Well, didn't you say you were going to count?

A. No, sir.

Q. 61. But you counted just the same?

A. Yes, sir.

Q. 62. But Mr. McNamara and Mr. Blackman were the responsible parties, were they?

A. They were the responsible parties, yes, sir.

Q. 63. If you and Ab. counted, it wasn't official—wouldn't go?

A. Oh, I don't know; it might. I wasn't there for that purpose, I wasn't.

Q. 64. How long did it take to get these cattle cut out now, and counted?

A. Probably an hour and a half or two hours. Somewheres along there; I don't know that exactly.

Q. 65. And then they were started at once to the Poplar River Agency, were they?

A. Yes, sir; they were.

Q. 66. Did you go with them a short distance?

A. Just a little ways; just opposite to the camp.

Q. 67. You were Mr. McNamara and Marlow's foreman at that time, weren't you, Mr. Knoell?

A. Yes, sir; I was supposed to be.

Q. 68. And you went a short distance, a mile or two, with them, didn't you, Mr. Knoell?

A. Probably a mile to our camp; the cattle were west of the camp; and I followed with them to our camp.

Q. 69. The cattle were going east?

A. Yes, sir.

Q. 70. They drove them from Oswego?

A. Yes, sir; right by there.

Q. 71. And you followed them down as far as the camp and stopped there, did you? A. Yes, sir.

Q. 72. Now, who came along down with you?

A. We were all right along with the cattle.

Q. 73. McNamara and Marlow too?

A. McNamara and Marlow too, yes, sir, and so was Blackman.

Q. 74. Anybody else there?

A. There was a lot of boys there; might have been four or five men there; there was some men working for that outfit.

Q. 75. Now, Mr. McNamara and Marlow had hired some men to go down to Poplar with these cattle, hadn't they?

A. They had men down there all the time.

Q. 76. These were men that you had hired, or men that you had with you all the time that went with them?

A. Yes, sir.

Q. 77. Who was in charge there?

A. A fellow by the name of Bob Dye.

Q. 78. Bob Dye took charge of the cattle and took them to the agency, did he? A. Yes, sir.

Q. 79. Well, you were horseback of course?

A. Yes, sir.

Q. 80. After you came back what did you do with the horses?

A. Rode up to the camp and stopped there.

Q. 81. Tie your horse?

A. No, sir; let him stand; they will stand anywhere.

Q. 82. Didn't unsaddle him? A. No, sir.

Q. 83. And during the time that this interview took place, your horse was standing there outside the tent?

A. What interview?

Q. 84. With Ab. Niedringhaus, that you have been testifying to? A. I don't remember that.

Q. 85. How long had your horse been standing there outside the tent, Mr. Knoell?

A. Stood there until I got ready to use him.

Q. 86. How long before you got ready to use him?

A. I don't know; might have been two hours.

Q. 87. You went into the tent though, did you?

A. Yes, sir.

Q. 88. Who was there?

A. Mr. McNamara, Mr. Marlow and Mr. French.

Q. 89. Anybody else? A. No, sir.

Q. 90. How long was it before anybody else came in?

A. We wasn't there but a short time; it seems like Mr. A. W. Niedringhaus came in.

Q. 91. Well, he had been right there with you up to this time? A. No, sir.

Q. 92. Rode up with you, and helped to drive the cattle? A. No, sir.

Q. 93. Where did he go?

A. No, he had left us some place, but I don't know where he did go to.

Q. 94. Left when the cattle started?

A. No, sir; he was there when we started to come down to the camp.

Q. 95. Anybody there representing the N. Bar N. people when the cattle left, except Blackman?

A. Yes, sir.

Q. 96. Then you left, leaving Bob Dye and those he had with him to drive the cattle down?

A. Yes, sir.

Q. 97. Well, when Mr. Niedringhaus came in, what did he say?

A. He asked for a receipt for those 307 head of cattle that was turned over to Mr. McNamara and Mr. Marlow. Mr. McNamara sat down and gave it to him.

Q. 98. Then what did he say?

A. He asked for a draft for the cattle that was turned over the day before and that day.

Q. 99. What did Mr. McNamara say to that?

A. Mr. McNamara said, "Mr. Marlow will settle with you."

Q. 100. Well, did Mr. Marlow do it?

A. Yes, sir; he did.

Q. 101. Well, was the settlement entirely satisfactory to Mr. Niedringhaus?

A. No, I don't think it was.

Q. 102. Well, then, if it was settled with Mr. Niedringhaus, how did he happen to go afterwards and call in Mr. Sharp and Mr. H. L. Niedringhaus?

A. Well, Mr. Niedringhaus wouldn't settle; said he didn't have any authority to settle.

Q. 103. Did he say anything else about it?

A. Said he would have to go down and see Mr. H. L. Niedringhaus.

Q. 104. Now, you have stated what Mr. Marlow figured up there; did you see the statement that he had made out? A. No, sir; I did not.

Q. 105. Didn't see it? A. No, sir.

Q. 106. Well, how do you recollect what that statement contained then, if you didn't see it?

A. I could hear them talk; after they explained to Mr. Niedringhaus what it was.

Q. 107. Well, you have talked this over with Mr. Marlow and Mr. McNamara several times since that?

A. No, sir.

Q. 108. How often have you talked it over?

A. Not at all.

Q. 109. Well, have you talked it over with anybody else?

A. Well, might have in conversation with the boys, or something like that.

Q. 110. You had to Mr. French?

A. No, sir; not at all.

Q. 111. Now, there was \$47,575.00 coming to the N. Bar N. people was there, according to that statement figured up by Mr. Marlow?

A. I guess there was; taking the shortage out, there wasn't that much.

Q. 112. Did you make a minute memorandum of the amount at that time?

A. Yes, I guess I did; I remembered it, anyway.

Q. 113. Well, did you make any memorandum of it anywhere in writing? A. No, sir.

Q. 114. And you remember that that was the amount, do you, exactly? A. Yes, sir.

Q. 115. And you haven't talked it over with anybody since then? A. Not that I remember of.

Q. 116. Well, is there any reason why you would remember the amount any more than any other thing that took place there?

A. I don't know that there is any reason that I know of.

Q. 117. Now, the shortage was also figured up, wasn't it? A. Yes, sir.

Q. 118. How much did that amount to?

A. There was something like 1900 head.

Q. 119. No, but in dollars; how much did that amount to? A. Something like \$37,000.00.

Q. 120. Was that exactly the sum? A. No, sir.

Q. 121. Well, then, how do you remember one sum more than another—you heard both sums mentioned there?

A. I couldn't say. Don't you remember one thing more than others at times?

Q. 122. Now, you heard the sum that Mr. Marlow figured up there as the shortage, didn't you, Mr. Knoell?

A. Yes, sir.

Q. 123. And you don't remember it, do you?

A. Remember what?

Q. 124. Remember what that sum was exactly, do you?
A. Not to a dollar, no, sir.

Q. 125. Now, you also heard the sum that he figured up as being the amount due for the cattle that had been delivered October 21st and 22d, the cattle that were being held and the five hundred head of horses?

A. Yes, sir.

Q. 126. That was \$47,675.00, wasn't it?

A. No.

Q. 127. And was it—how much was it?

A. \$47,575 with the strays.

Q. 128. Was Mr. Marlow figuring in the strays?

A. Yes, sir; he was.

Q. 129. How many strays did he figure in?

A. 113 head of strays.

Q. 130. That was the number he figured in?

A. Yes, sir.

Q. 131. Were any of those steers or spayed heifers?

A. I really don't know; didn't notice that.

Q. 132. But the strays you remember, amounted to 113 head?
A. Yes, sir.

Q. 133. Did you get any more strays after that?

A. I didn't see any more.

Q. 134. Learn of any more? A. I did not.

Q. 135. Did you make a memorandum anywhere of the strays?
A. No, sir.

Q. 136. Now, how are you able to testify to the exact number of strays, and you are not able to testify as to the number of cattle that were claimed by Mr. McNamara?

mara and Mr. Marlow to be short on this settlement that they were having?

A. Because I heard them talking about it, and figuring it out—Mr. Niedringhaus and Mr. Marlow.

Q. 137. Well, didn't you hear them talking about the shortage and figuring it up?

A. I heard them talk about the shortage.

Q. 138. And figure it up?

A. Well, I didn't see them figure it up; I heard them talking about it.

Q. 139. Was there any dispute as to the number that was short? A. Not that I know of.

Q. 140. Well, what was the number stated to be that they were short, Mr. Knoell? A. I don't know.

Q. 141. Well, was anything further said at this time between Mr. McNamara and Marlow and Mr. Niedringhaus—Mr. A. W. Niedringhaus, in your presence?

A. Nothing that I remember.

Q. 142. Nothing that you remember?

A. Not that I know of; I don't just exactly understand your question.

Q. 143. Well, Mr. A. W. Niedringhaus left the tent, did he say anything about where he was going, or what he was going to do?

A. When he left the tent what time?

Q. 144. Well, we are talking about after you got back from getting these cattle started for Poplar, when Mr. Ab. came in after you got there some time, and demanded a receipt of Mr. McNamara, and he gave it to him?

A. After he left that time and said he was going to see Mr. H. L. Niedringhaus.

Q. 145. Then you do remember something further that was said between them? A. I expect I do.

Q. 146. Well, did Mr. McNamara and Mr. Marlow say anything in reply to that?

A. No, I don't think they did.

Q. 147. Just said that and left the tent?

A. Yes, sir; and went for Mr. H. L. Niedringhaus.

Q. 148. Well, while he was gone, what did Mr. McNamara and Mr. Marlow do?

A. Just sat there in the tent, and waited for them to come back.

Q. 149. Talk about anything while they were gone?

A. Nothing of any importance.

Q. 150. Do you remember anything that was said while they were gone, Mr. Knoell?

A. No, sir; I do not.

Q. 151. Was anything said?

A. Not that I know of.

Q. 152. They set there one on each side of the table?

A. Not that I remember of.

Q. 153. Where were they?

A. On the inside of the tent.

Q. 154. Were you in or out?

A. Might have been both in and out.

Q. 155. How long was he gone, if you remember?

A. Might have been gone ten or fifteen minutes.

Q. 156. When he came back who was with him?

A. Mr. Niedringhaus and Mr. Sharp.

Q. 157. When he came back, what was the next thing that was done? A. They introduced him to them.

Q. 158. Did they introduce him to you?

A. No, sir.

Q. 159. Or to Mr. French? A. No, sir.

Q. 160. Now, what did they say?

A. He said he was there representing his company, and they would have to settle with him, and they offered him the same figures and the same money that they had Mr. Niedringhaus.

Q. 151. Now, what did they say about it when Mr. Niedringhaus—or rather Mr. Sharp told them, he was there representing the company; what did he say?

A. He demanded a draft for the cattle that they had received.

Q. 152. That day or the day before?

A. That day and the day before.

Q. 153. Did they give it to him? A. No, sir.

Q. 154. Did they refuse to give him the money?

A. No, sir. They presented the same figures, and also the money that was due him for the cattle which were delivered.

Q. 155. Well, did they say anything when they did this?

A. They explained to him the cattle they had received.

Q. 156. What explanation did they make—what did they say? A. What did who say?

Q. 157. McNamara or Marlow?

A. They said they would pay him for the cattle, and

they produced this piece of paper with the figures on, and the money that was coming to them, for the cattle they had received the day before and that day, and the 457 head of cattle that they were holding and the 500 horses.

Q. 158. Did they tell him all this?

A. They did, and figured it up, and offered him this \$9,675.

Q. 159. How much did Mr. Sharp claim was coming to him then? A. Didn't claim anything.

Q. 160. Was that \$9,675 all for the cattle that was delivered that day and the day before?

A. No, sir.

Q. 161. How much did it lack?

A. I don't know at all.

Q. 162. Do you remember what the contract price of the cattle was, Mr. Knoell? A. Yes, sir.

Q. 163. How much was it?

A. Twenty-five dollars a head.

Q. 164. Now, if they had delivered 626 head of cattle the day before and 307 that day— A. Yes, sir.

Q. 165. Well, how much would that come to?

A. I don't know.

Q. 166. You know that the \$9,675 wasn't payment for these cattle, don't you?

A. It wasn't payment for them.

Q. 167. What else was said there with reference to this matter that you recall, anything—have you told the whole story now?

A. I think I have. Mr. Sharp refused to take the money; wouldn't accept the money, and wouldn't settle with them.

Q. 168. They wouldn't pay him the money?

A. They said they would pay if they would bring the the cattle and horses in?

Q. 169. They said they would pay if they would bring the cattle and horses in?

A. They said they would pay him \$9,075 for the whole works, if they would bring them in.

Q. 170. What did Mr. H. L. Niedringhaus have to say?

A. Didn't have a word to say. Mr. Sharp said that Mr. W. F. Niedringhaus refused to pay for the shortage.

Q. 171. Did Mr. Niedringhaus—or rather Mr. Sharp—say anything about anybody having broken the contract?

A. No, sir; not that I heard.

Q. 172. Have you told now all that took place at that conversation that you can recall that transpired?

A. About all at that time, only Mr. McNamara said that he would bet him a suit of clothes that Mr. W. F. Niedringhaus never said that, that he refused to pay the shortage.

Q. 173. Where was Mr. W. F. Niedringhaus at this time?

A. He wasn't there I don't know where he was.

Q. 174. He didn't take the bet then? A. No, sir.

Q. 175. Well, what time in the course of events was it when this took place—was it earlier in the game or later on?

A. Oh, later on, after it had drifted into a general talk.

Q. 176. No bad feeling over it?

A. No, not at all; they were talking their business matters over.

Q. 177. Well, how long did this take? How long was it from the time Sharp and Mr. H. L. Niedringhaus came there, till they went away again?

A. Oh, it might have been three-quarters of an hour, or something like that—more or less.

Q. 178. Talk an hour?

A. Somewhere's along there; I couldn't say for certain.

Q. 179. Couldn't say for certain? A. No, sir.

Q. 180. How long did the interview that took place that morning occupy, Mr. Knoell?

A. Not very long.

Q. 181. Well, about how long?

A. Five minutes or ten minutes; fifteen or twenty minutes; might have been a little longer.

Q. 182. After they left the tent did you see where they went to, Sharp and Niedringhaus—H. L.?

A. They went down to the store there.

Q. 183. How long before you saw them again?

A. Not very long. I couldn't say just how long it was.

Q. 184. Where did you see them next?

A. I saw them around the store, and the stockyards and all around there.

Q. 185. Well, when was it that these horses were brought in that you have mentioned to Mr. McIntire and turned into the stockyards?

A. They were brought in some time that morning or afternoon; about noon. /

Q. 186. About noon?

A. Yes, I don't remember the exact time.

Q. 187. How long after this interview? It was after this talk with McNamara and Marlow and Niedringhaus, was it?

A. Not very long after that.

Q. 188. How long would you think, Mr. Knoell, you were there?

A. Oh, I couldn't say how long.

Q. 189. You were there, weren't you?

A. Yes, sir.

Q. 190. There all that day?

A. Yes, sir.

Q. 191. Didn't leave until the next day; didn't leave Oswego until the 23d?

A. Didn't leave when?

Q. 192. Didn't leave Oswego until the 23d of October?

A. Yes, sir; I did.

Q. 193. Did you leave on the evening of the 22d?

A. Yes, sir.

Q. 194. Well, you went back there again on the 23d?

A. Went back again on the night of the 22d.

Q. 195. Back on the night of the 22d?

A. Yes, sir.

Q. 196. Now, when these horses were brought into the corral there, where were you and Mr. McNamara and Marlow?

A. They was around the stockyards some place. I don't know where they was.

Q. 197. You don't recall where you was?

A. In the stockyards somewhere.

Q. 198. How far was it from the stockyards to your tent?

A. About four or five hundred yards.

Q. 199. Who else was around the stockyards when the horses were brought in except yourself?

A. Oh, there was a lot of different men around there.

Q. 200. Any representative of this defendant company?

A. Not that I remember of. Blackman was there when they were driving the horses in.

Q. 201. Loss didn't bring the horses in himself, did he?

A. I don't remember. I saw him around the yards so often.

Q. 202. Don't you remember that Loss was there after this talk with Sharp?

A. I don't know.

Q. 203. Where were these horses brought from?

A. They were there holding them; they just brought them from the pasture.

Q. 204. Were they there in the pasture?

A. They had been, part of them. A part of them were there holding these cattle, and then they put them all together.

Q. 205. How far is it from Oswego to the Home ranch of the Lazy N. outfit?

A. Two miles and a half in this side of the river, and about two miles and a half when you get to the river.

Q. 206. Well, where did you first see Mr. McNamara and Mr. Marlow after the horses were put in the corral?

A. Well, I seen them in the corral; I seen them in there.

Q. 207. Well, you went in with them?

A. I don't remember; I don't think I did, though.

Q. 208. Didn't you go and tell them the horses were in the corral, and you and them walked up to the corral together?

A. No, sir; I did not.

Q. 209. Are you positive about that?

A. I think I am.

Q. 210. Well, when you got to the corral with Messrs. McNamara and Marlow, who was there representing The Home Land and Cattle Company?

A. I didn't go to the corral.

Q. 211. Well, when you were all there together, you were with Mr. McNamara and Marlow that afternoon?

A. Yes, sir.

Q. 212. Who was representing The Home Land and Cattle Company?

A. Mr. Sharp.

Q. 213. Now, what took place between Mr. Sharp and Mr. McNamara and Marlow, that fell under your observation?

A. Nothing right then.

Q. 214. Not right then?

A. No, sir; not that I know of.

Q. 215. Well, how soon after did anything take place?

A. Nothing that I know of.

Q. 216. You counted these horses?

A. Yes, sir.

Q. 217. Anybody else count them?

A. Mr. McNamara and Mr. Blackman.

Q. 218. Had anything been said by Sharp or Niedring-

haus or Marlow or McNamara up to this time that you heard?

A. No, I didn't hear anything about the horses until I began to count them. That is the first thing I heard.

Q. 219. Well, they counted the horses, did they?

A. Yes, sir.

Q. 220. And they finally got 500 head into one yard?

A. Yes, sir.

Q. 221. Then did you hear anything said between them?

A. Yes, sir; after that I did. Mr. Sharp demanded the draft for the horses right there and then, and they demanded pay for the balance of the cattle, and they said they would settle for the whole business, but they refused to do this; they wouldn't do it.

Q. 222. What then happened?

A. Mr. Marlow tendered them the sum of money—the same amount of money that he had before.

Q. 223. How did he do it?

A. Offered them the money.

Q. 224. Where was Mr. H. L. Niedringhaus?

A. He was there.

Q. 225. It was in his presence? A. Yes, sir.

Q. 226. Anything said or done about paying for the cattle that had been received that day and the day before by Mr. Sharp? A. Not to my knowledge.

Q. 227. Mr. Sharp say anything about a breach of the contract there at that time?

A. Not that I know of.

Q. 228. If he did say it, you didn't hear it?

A. I didn't hear him say anything about the contract.

Q. 229. Then what took place after Mr. Sharp had declined to receive this money?

A. Well, they demanded that he bring the cattle in, this 457 head.

Q. 230. Did they do so?

A. No, sir, McNamara and Marlow said if they would bring the cattle in they would settle for the whole business.

Q. 231. They said if they would bring the cattle in they would settle for the whole business?

A. They said if they would bring the cattle in they would settle the whole business.

Q. 232. Who said this?

A. Mr. McNamara and Marlow.

Q. 233. Well, what did Mr. McNamara and Mr. Marlow say?

A. They told them to bring the cattle in and they would settle for them.

Q. 234. Well, did they bring the cattle in?

A. No.

Q. 235. Is that all that took place at that time, or was there something further said or done between those parties? Is that the whole story?

A. All of it, I guess.

Q. 236. Well, if that is all, we will quit; if there is anything more I would like to have it.

A. I guess that it is all I know about it.

Redirect Examination.

Q. 1. Mr. Knoell, these animals that were held in the neighborhood of Oswego, what would be done with them there from day to day and from night to night; what was done with them, were they grazing around there?

A. They were holding and grazing them around there.

Q. 2. Now, in grazing animals in that way, they wouldn't keep them in one place all the time, would they?

A. No, sir; sometimes you have to take them five, six, or seven miles to get water for them.

Q. 3. Now, I will ask you when this bunch of 307 head were driven to Poplar Agency, did you yourself hire any extra man to help on that drive?

A. Yes, sir; I did.

Q. 4. How many men did you hire? A. Three.

Q. 5. And where did you first get those men?

A. I got them there at Oswego.

Q. 6. Men that were living around there?

A. Men that had been at work there, and had got through.

Q. 7. You hired some of The Home Land and Cattle men did you, Mr. Knoell?

A. Yes, sir; some of them that had been working for them and had got through.

Recross-Examination.

Q. 1. So these were not men that McNamara and Marlow had there?

A. We had men around there; but it took more than two men to take them down there; it took five men.

HERMAN F. KNOELL.

Subscribed and sworn to before me this 31st day of January, 1899.

HENRY N. BLAKE,
Master in Chancery.

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

C. J. McNAMARA and T. A. MAR-
LOW, Copartners Doing Business Un-
der the Firm Name and Style of Mc-
Namara and Marlow,

Complainants,

vs.

HOME LAND AND CATTLE COM-
PANY and THE NATIONAL BANK
OF COMMERCE,

Defendants.

Testimony in Rebuttal.

Be it remembered that on this 20th day of May, 1899, in pursuance of the stipulations hereto attached, H. G. McIntire appearing as counsel for plaintiffs, and E. C.

Day appearing as counsel for defendants, the plaintiffs in the above-entitled action, in order to support their action, offered in rebuttal of the testimony taken by the defendants herein, the testimony of C. J. McNamara and Thomas A. Marlow, witnesses who were produced in person, and who being by me first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

C. J. McNAMARA, a witness on behalf of the plaintiffs.

Direct Examination.

(By H. G. McINTIRE, Esq.)

Q. In the testimony offered by A. W. Niedringhaus on behalf of the defendant herein, and on page 69 of the typewritten copy of the same, appears the following:

“Q. You may detail what took place on October 21 relative to the delivery of cattle, giving the conversations that you had with Messrs. McNamara and Marlow.

“A. When they stepped off the train I started to show Mr. McNamara my power of attorney from the bank, and asked him if he wanted to read it. Mr. McNamara said that he had received what he supposed was a copy of the same thing and it was not necessary for him to read it. Shortly after that I told Mr. McNamara in the presence of Mr. Sharp that we would have to have a draft for cattle as they were delivered. Mr. McNamara replied that as the mail east had already left, I could not mail it anyway until the next day and he wanted a delivery for Poplar, and if I would wait until

the following day—this would be the 22d—he would give me a draft for the beefs loaded on the 21st and cattle going to Poplar. I told him that would be satisfactory.”

Q. What have you to say as to that, Mr. McNamara?

By Mr. DAY.—To which the defendants object on the ground that the same is not rebuttal testimony, the witness having attempted to detail what took place at this meeting in the evidence in chief.

(Overruled. H. N. B.-M.)

A. Mr. Niedringhaus never asked me anything about giving a draft for the cattle when we got off there; in fact, never said anything about a draft until the next day at my tent at which time I turned him over to Mr. Marlow.

Q. The next day at your tent was that before or after the delivery of the cattle that went to Poplar?

A. After the delivery.

Q. I will ask you whether in the conversation detailed in the first question herein you ever promised or told Mr. Niedringhaus that you would give him a draft?

A. No, sir; I never did.

Q. This conversation, as I understood it, occurred as soon as you arrived at Oswego, did it not?

A. About that time, yes, sir.

Q. Had any cattle at all been delivered at that time?

A. No, sir.

Q. Again, Mr. McNamara, in the testimony of Mr. Sharp contained on page 149 of the typewritten copy thereof, Mr. Sharp says as follows, referring to the con-

versation had at Oswego, October 21, 1897: "Albert Niedringhaus told him that in accordance with the terms of that power of attorney he would say that he would have to have a draft for the cattle as they were delivered." I now ask you, Mr. McNamara, whether Mr. Niedringhaus told you anything of the kind.

By Mr. DAY.—Objected to as not proper rebuttal testimony.

(Overruled. H. N. B.-M.)

A. No, sir.

Q. Do I understand, then, that nothing was said by Mr. Niedringhaus with reference to any draft at the conversation referred to?

A. Nothing was said about a draft.

Q. In the delivery of the cattle under the contract set out in the complaint herein, Mr. McNamara, did you or anyone in behalf of your firm at any time insist or dictate the method by which the cattle were to be delivered?

A. No, sir; we never did.

Q. State, if you please, how the cattle were delivered and received by you.

By Mr. DAY.—Objected to as not proper rebuttal testimony.

(Sustained. H. N. B.-M.)

A. Whenever they had cattle ready to turn over they would notify us either by letter or wire, and then I would go there and on my arrival Mr. Blackman would usually ask me what kind of cattle I wanted, whether steers or stock cattle, and I would tell him what class of cat-

tle I would prefer first. That was all I ever had to do with the cattle—take what they would give me.

Q. Was that course pursued on October 21st to 22d?

A. Yes, sir; the cattle had to be classed there before they were loaded as there were two kinds of cattle; they merely asked me for convenience what kind I wanted to load first.

Q. In the testimony of Mr. Blackman taken on behalf of the defendants herein, and on page 106 of said testimony, appears the following: "After the horses had arrived I went in the lead to open the corral gate. When at the corral gate, Mr. McNamara and Mr. Marlow were both standing on the back side of the corral talking apparently. Mr. McNamara says, 'Blackman, you need not pen them horses for I am not going to take them.' I says, 'I can't help that, Mr. McNamara, if you receive them or not I have orders to pen those horses and I'll do it.' Mr. McNamara says all right." Please tell us what you have to say with reference to that testimony.

A. I never told Mr. Blackman not to pen the horses or that I would not take the horses; I merely asked Mr. Blackman if they intended to give us the horses.

Q. Mr. McNamara, I will ask you whether in any conversation with Mr. Sharp he ever asked you whether you would dispense with the putting of cattle in the corral on October 22d, 1897.

A. No, I don't remember as to that.

Q. I will ask you whether Mr. Sharp or anyone on behalf of the defendants ever made any unconditional ten-

der of either the horses or cattle to you or Mr. Marlow on October 22d, 1897?

A. I don't understand the question. All I understand is this, he brought the horses in there and then refused to let us have them; Mr. Marlow and him had some talk in the corral when I was not present.

Q. Did Mr. Sharp or anyone on behalf of the defendants offer you any cattle or horses on October 22d, 1897?

A. Yes, sir.

Q. When such offer was made did he ask or insist that you do anything?

A. He insisted upon our giving him a draft for the stuff before he would deliver.

Q. So that offer or tender made on October 22d, 1897, was accompanied by the condition that you would give him a draft for the cattle to be delivered?

A. Yes, and the horses and the 457 head of cattle out there.

Q. What did he insist upon a draft for?

A. For the payment for these horses and the 457 head of cattle and also the cattle received that morning and the day before.

Q. In other words, he insisted on a draft for all that had been delivered and that were to be delivered before he would deliver? A. Yes, sir.

Cross-Examination.

(By Mr. E. C. DAY.)

Q. Was anything said at the time you first met Mr. A. W. Niedringhaus at Oswego on October 21st about the delivery of any cattle for the Poplar River Agency?

A. Yes, sir.

Q. What was said?

A. He said that he would turn me over a trainload that evening and give me the Poplar cattle the next morning; I don't know that he said it either; it was either he or Mr. Blackman said it.

Q. Was that stated by them in response to any request of yours to cut the cattle out so that they could be sent to Poplar?

A. No, they just merely asked me what I wanted and I told them I wanted a trainload that day and the Poplar River cattle in the morning unless we could handle them all that day.

Q. In the deliveries of cattle did the defendants at any time ever deliver to you more cattle than cars had been provided for by you?

A. No; we always had cars enough there to take the cattle as fast as they could give them to us.

Q. And the cattle, as I understand it, were cut from the larger herd to fill the cars as they were provided at the station?

A. They were generally brought in trainload lots; yes, sir.

C. J. McNAMARA.

Subscribed and sworn to before me this 20th day of May, 1899.

CHAD A. SPAULDING,
Notary Public in and for the County of Lewis and Clarke,
State of Montana.

T. A. MARLOW, a witness on behalf of the plaintiff, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By H. G. McINTIRE, Esq.)

Q. Mr. Marlow, I believe in your direct examination you testified that you were in the tent when Mr. Sharp came around there the morning of the 22d of October, after the delivery of the cattle that went to the Poplar Agency, did you not? A. Yes, sir.

Q. I will ask you whether at that time when Mr. Sharp came in the tent anything was said by him that would indicate that a draft had been promised to him by Mr. McNamara the day before for cattle received?

A. No, sir.

Q. What did Mr. Niedringhaus say?

A. He came up and asked for a settlement on the two lots of cattle that had been previously delivered. He first took his receipt for the last batch that had been delivered, and then asked for a draft in payment of the two lots.

Q. Was Mr. Blackman in the tent at the time when Mr. Niedringhaus first came up?

A. No, sir; he was not.

Q. He came after that, did he? A. Yes, sir.

Q. He was, however, in the tent when Mr. Sharp was there, was he?

A. Yes, sir; my recollection is that he was.

Q. You were standing with Mr. McNamara were you at the time Blackman was putting the horses in the pen?

A. Yes, sir; McNamara and I were together at one of the wings of the stockyard.

Q. Did Mr. McNamara at that time tell Blackman that he, Blackman, need not put the horses in the pen for you were not going to take them?

A. He did not.

Q. You were present also, I believe, were you not, when Sharp, on behalf of the defendants, spoke to yourselves with regard to the putting of cattle in the pen on October 22d, 1897? A. I was.

Q. I will ask you now, Mr. Marlow, whether Mr. Sharp or anyone on behalf of the defendants at that time or at any time on October 22d, 1897, offered or tendered you any horses or cattle under he contract without conditions? A. They did not.

Q. They made offers or tenders to you, however, did they not? A. Yes, sir.

Q. When these various offers or tenders of the cattle or horses were made to you, what was said with reference to any conditions to be performed by you gentlemen?

A. The horses were first put into the corral and we selected the 500 head and they refused to deliver unless we gave them a draft for the horses; we then tendered them this \$9,700.00 and gave them a statement as we had in the forenoon, and on that he refused to deliver; he then stated that he would not pen the cattle unless we would give him our word in advance that we would give him a draft for these cattle when they were counted

sworn to testify the truth, the whole truth, and nothing but the truth in said cause; that said deposition was taken at the time and place mentioned, to wit, at my office, room 23 Montana National Bank Building, Helena, Montana, on the 20th day of May, 1899, at two o'clock P. M.; that said deposition was reduced to writing by me and when completed was by me carefully read to said witnesses; and being by them corrected was by each of said witnesses subscribed in my presence.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office this 20th day of May, A. D. 1899.

CHAD A. SPAULDING,

Notary Public in and for the County of Lewis and Clarke,
State of Montana.

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

C. J. McNAMARA and T. A. MAR-
LOW, Copartners Doing Business Un-
der the Firm Name and Style of Mc-
Namara and Marlow,

Complainants,

vs.

HOME LAND AND CATTLE COM-
PANY and THE NATIONAL BANK
OF COMMERCE,

Defendants.

Stipulation as to Taking Rebuttal Testimony.

It is hereby stipulated and agreed that the testimony in rebuttal offered by plaintiffs in the above action may be taken before Chad A. Spaulding, a notary public at room 23 in the Montana National Bank Building, Helena, Montana, on May 20th, 1899, at two o'clock P. M., stenographically, and when so taken shall be by him reduced to typewriting and signed and sworn to by the respective witnesses, and thereupon shall be by said notary public filed in this action, and shall thereupon have the same

force and effect as if the same had been taken before the master in chancery, Hon. Henry N. Blake, herein.

Dated May 20th, 1899.

H. G. McINTIRE,

WM. WALLACE,

Attorneys for Plaintiffs.

CULLEN, DAY & CULLEN,

Attorneys for Defendants.

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

C. J. McNAMARA and T. A. MAR-
LOW, Copartners Doing Business Un-
der the Firm Name and Style of Mc-
Namara and Marlow,

Complainants,

vs.

HOME LAND AND CATTLE COM-
PANY et al.,

Defendants.

Stipulation Extending Time to Take Testimony in Rebuttal.

In this cause it is stipulated and agreed that plaintiffs may have thirty (30) days' time from date in which to introduce testimony on their behalf in rebuttal.

Dated April 29, 1899.

CULLEN, DAY & CULLEN, .

Solicitors for Defendants.

H. G. McINTIRE,

Solicitors for Plaintiffs.

[Endorsed]: Title of court and cause. Complainants' testimony in rebuttal. Filed and entered May 22, 1899, Geo. W. Sproule, Clerk.

[Endorsed]: Title of court and cause. Testimony of complainants reported by Henry N. Blake, Master in Chancery. Filed and entered and published, June 27, 1899. Geo. W. Sproule, Clerk.

Complainants' Exhibit "A."

(H. N. Blake, Master.)

This agreement made and entered into this 27th day of May, A. D., 1897, at Chicago, county of Cook and State of Illinois, by and between The Home Land and Cattle Company, a corporation existing under the laws of the State of Missouri, by its President, Wm. F. Niedringhaus (hereafter called the party of the first part) and McNamara and Marlow of Big Sandy, Montana (hereafter called the parties of the second part), witnesseth:

That said party of the first part for and in consideration of the sum of one dollar and other valuable considerations hereby agrees to sell to the said second parties all of their herd of stock cattle, including steers, said herd consisting of thirty thousand head (30,000), more or less, now ranging upon the ranges in Valley, Dawson and Custer Counties, Montana, and being branded as follows, to wit:

§ on right hip; N·N on left hip and side, and any other brands owned by said first party.

The terms and conditions of said agreement to sell are as follows:

First: Said cattle are to be gathered by said first party and counted out to said second parties at the stockyards at Nashua, or Oswego, Montana, on line of the Great Northern Railway during the regular round-up season of 1897, no cattle to be tendered or accepted later than November 1st, 1897; all stock cattle in said herd to be accepted by said second parties whenever tendered (prior to November 1st, 1897) in not less than trainload lots; all steers from three years old up, and all spayed heifers and dry cows to be delivered and counted at same points, when marketable for beef in the opinion of said parties of the second part.

Second: All calves of the season of 1897 to be delivered without count or charge to said second parties, whether branded or unbranded.

Third: No lumpy-jawed cattle to be counted in deliveries.

Fourth: Should the two parties to this contract at the close of deliveries for 1897 fail to agree upon a price at which said second parties shall purchase the Brands owned by said first party together with all cattle bearing same, said first party agrees during the round-up season of 1898 (prior to November 1st, 1898) to again gather all of the remainder of said herd that it can find with diligent work and deliver same to said parties of the second part at the same places and in the same manner and at same price as provided for the season of 1897.

Fifth: The price to be paid by said parties of the second part for said cattle is the sum of twenty-five dollars

(\$25.00) per head for each and every head delivered as above provided, payable upon the delivery of said cattle.

Sixth: Said first party hereby acknowledges the receipt of the sum of fifty thousand dollars (\$50,000) as a first payment of said cattle, which sum is to deducted, \$25,000.00 from the first deliveries made under this contract and \$25,000.00 from deliveries not later than September 15th, 1897.

Seventh: Said second parties hereby bind themselves to accept and pay for said cattle at the price stated when the same are tendered to them, under the terms of this contract.

Eighth: Said first party hereby agrees to deposit with Messrs. Rosenbaum Bros. & Co. of Chicago, Ills., the written and acknowledged consent to this sale of all parties holding liens or mortgages of any kind against the cattle or property embraced in this contract upon the payment of the fifty thousand dollars (\$50,000), stated as a first payment above.

Ninth: Said first party hereby guarantees to deliver to said second parties during the season of 1897 not less than nine thousand head (9,000) of steers of the ages of three years old and up and spayed heifers of the ages of four years and up. Should they fail so to do, they hereby agree to pay to second parties the sum of twenty dollars (\$20.00) in cash for each and every head less than nine thousand (9,000) head of such cattle so delivered.

Tenth: At the end of the round-up season of 1897 the parties of the second part agree to purchase of party of the first part five hundred head of saddle and work

horses at the price of twenty dollars (\$20.00) per head. Said horses to be selected by parties of second part from entire herd of 700 head of party of first part and to be serviceable and sound horses. Work and saddle horses to be selected in proportion.

This agreement to be binding upon the heirs, successors and assigns of both the parties hereto.

Witness our hands and seals this 27th day of May, A. D. 1897.

HOME LAND AND CATTLE COMPANY.

By WM. F. NIEDRINGHAUS, [Seal]

President.

McNAMARA & MARLOW. [Seal]

Witness:

CHARLES HAAS.

GEO. W. NIEDRINGHAUS.

Filed and entered June 27, 1899. Geo. W. Sproule, Clerk.

Complainants' Exhibit "B."

(H. N. Blake, Master.)

NATIONAL BANK OF COMMERCE in St. Louis.

Capital \$3,000,000.

W. H. THOMPSON, President.

J. C. VAN BLARCOM, Cashier.

St. Louis, Oct. 14th, 1897.

Mess. McNamara & Marlow, Big Sandy, Montana.

Gentlemen: In accordance with the conditions in the contract of date, Chicago, Illinois, May 27th, 1897, between you and the Home Land & Cattle Company, we

advise you, that on Thursday, October 21st, 1897, there will be delivered to you by the Home Land & Cattle Company at the stock-yards at Oswego, Montana, about 820 head of beef cattle about 631 head of stock cattle and their herd of horses from which you are to make your selection of Five hundred.

We have appointed Mr. Albert W. Niedringhaus to represent us in the collection and receipting for this money, and have executed to him a power of attorney, a copy of which we herewith enclose you.

Yours truly,

J. C. VAN BLARCOM,

Cas.

Filed and entered Jun. 27, 1899. Geo. W. Sproule,
Clerk.

Complainants' Exhibit "C."

(H. N. Blake, Master.)

Form No. 2.

THE WESTERN UNION TELEGRAPH COMPANY.

Incorporated.

21,000 offices in America.

Cable Service to All the World.

THOS. T. ECKERT, President and General Manager.

Receiver's No. z. Sent by: WN. Recd. by: O. F.
Check 20 paid.

Send the following message subject to the terms on back hereof, which are hereby agreed to.

Received at 12:30 a. m., 189—.

Dated Wolf Point, Mont., 10-18.

To McNamara & Marlow, Big Sandy.

We will deliver you Oswego, twenty-first eight hundred twenty steers six hundred thirty-one stock cattle five hundred horses.

Albert W. Niedringhaus.

Filed June 27, 1899. Geo. W. Sproule, Clerk.

Complainants' Exhibit "D."

(H. N. Blake, Master.)

270 cows and heifers.

1 stag.

33 bulls.

50 steers 2 yr. old.

45 steers 1 yr. old.

27 heifers 2 yr. old.

31 heifers 1 yr. old.

457

All branded Z on right hip.

Filed and entered Jun. 27, 1899. Geo. W. Sproule,
Clerk.

Complainants' Exhibit "E."

(H. N. Blake, Master.)

May 30th, 1898.

Home Land and Cattle Co., c-o Saint Louis Stamping
Co., Saint Louis, Mo.

Gentlemen: Referring to article fourth of our contract with you for the purchase of the Z herd of cattle dated May 27th, 1897, by which deliveries for the present season are provided for, no trade for the brand having been made, we hereby beg to notify you that we are prepared to receive the remainder of the cattle as called for by said contract and hereby request that you proceed to gather and deliver same as provided therein without branding the calves of 1898. Your acknowledgment of this letter will oblige,

Yours truly,

McNAMARA & MARLOW,

Filed and entered Jun. 27, 1899. Geo. W. Sproule,
Clerk.

Complainants' Exhibit "F."

(H. N. Blake, Master.)

W. F. Niedringhaus, President. F. G. Niedringhaus,
Vice-President. Alex. Niedringhaus, Secretary.

Office of HOME LAND AND CATTLE COMPANY.

St. Louis, June 9, 1898. 18—.

Ranges:

Texas.

Montana.

New Mexico.

Messrs. McNamara & Marlow, Big Sandy, Mont.

Gentlemen: Your letter of date May 30th, 1898, to this company, is at hand. You, by your own actions, having broken the contract, we do not intend to make any further deliveries. We do not desire to sell our cattle and then not receive the contract price in return.

Yours truly,

HOME LAND & CATTLE CO.

F. G. Niedringhaus,

V. P.

Filed and entered Jun. 27, 1899. Geo. W. Sproule,
Clerk.

Complainants' Exhibit "G."

(H. N. Blake, Master.)

Home Land & Cattle Co., in ac. with McNamara & Marlow.

Credits for Cattle Received.

1897.					
July 11.	By 1,726 Head a.....	\$25	J. F. 321	\$43,150..	43,150
July 20.	By 1,409 Head a.....	\$25	J. F. 322	35,225.....	35,225
July 29.	By 679 Head a.....	\$25	J. F. 322	16,975.....	16,975
Aug. 16.	By 3,399 Head a.....	\$25	J. F. 326	84,975.....	84,975
Aug. 23.	By 3,806 Head a.....	\$25	J. F. 326	95,150.....	95,150
Sep. 4.	By 2,351 Head a.....	\$25	J. F. 330	58,775.....	58,775
Oct. 2.	By 1,649 Head a.....	\$25	J. F. 334	41,225.....	41,225
Oct. 22.	By 933 Head a.....	\$25	J. F. 334	23,325.....	
Nov. 30.	By 148 Stays a.....	\$25	J. F. 341	3,700.....	27,025

Total 16,100 To Balance Due us: 10,275

\$412,775

Complainants' Exhibit "G" (Continued).

Settlements.

C. B.

6. 7.97. 39 R. Bros. & Co., $\frac{1}{2}$ first
payment..... .25,000

C. B.

7.12.97. 65 Dft. No. 1 on R. Bros. &
Co., to N. Bk C... ..18,150 43,150

C. B.

7.22.97. 75 Dft. No. 2. on R. Bros. &
Co., to N. Bk. C..... 35,225

C. B.

7.29.97. 81 Dft. No. 3 on R. Bros. &
Co., to N. Bk. C..... 16,975

C. B.

6. 7.97. 39 R. Bros. & Co., $\frac{1}{2}$ first
payment... ..25,000

C. B.

8.16.97. 93 To Do. due them By H.
L. & C. Co... ..50,000

C. B.

8.16.97. 93 Dft. on R. Bros. & Co.,
No. 4 to N. Bk. C..... 9,975 84,975

C. B.

8.23.97. 99 Dft. on R. Bros. & Co.,
No. 8 to N. Bk. C.....89,859.70

C. B.

8.23.97. 99 R. Bros. & Co., bal. due
them by H. L. & C..... 5,290.30 95,150

C. B.		
9. 2.97.	109 Dft. on R. Bros. & Co., No. 9 to N. Bk. C.....	12,675
C. B.		
9. 3.97.	109 Dft. on R. Bros. & Co., No. 10 to N. Bk. C.....	12,675
C. B.		
9. 4.97.	109 Dft. on R. Bros. & Co., No. 11 to N. Bk. C.....	33,425
		58,775
C. B.		
10. 1.97.	129 Dft. on R. Bros. & Co., No. 12 to N. Bk. C.....	13,025
C. B.		
10. 2.97.	129 Dft. on R. Bros. & Co., No. 14 to N. Bk. C.....	13,825
C. B.		
10. 2.97.	129 Dft. on R. Bros. & Co., No. 15 to N. Bk. C.....	14,375
		41,225
J. F.		
11.30.97.	341 1865 steers short at \$20	37,300
		<hr/>
		\$412,775

Filed and entered Jun. 27, 1899. Geo. W. Sproule,
Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

CORNELIUS J. McNAMARA and
THOMAS A. MARLOW, Copartners
as McNamara and Marlow,

Complainants,

vs.

THE HOME LAND AND CATTLE
COMPANY and THE NATIONAL
BANK OF COMMERCE,

Defendants.

Stipulation as to Shipment of Cattle, etc.

It is hereby stipulated and agreed that in the year 1898 the defendant Home Land and Cattle Company rounded up and gathered in the State of Montana five hundred and ten (510) cattle of the brands mentioned in the complaint herein classified as follows: 232 steers, 165 cows, 42 bulls, 4 heifers, 67 calves; that the same were shipped by said Home Land and Cattle Company to and sold at Chicago, Illinois, and realized the sum of \$15,256.00, which money was paid to said Home Land and Cattle Company.

Dated March 14, 1899.

H. G. McINTIRE,

WM. WALLACE,

Solicitors for Complainants.

CULLEN, DAY & CULLEN,

Solicitors for Defendants.

[Endorsed]: Title of court and cause. Stipulation as to cattle shipped and amount realized in 1898. Filed March 14, 1899. Geo. W. Sproule, Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

CORNELIUS J. McNAMARA and
THOMAS A. MARLOW, Copartners
Under the Firm Name and Style of
McNamara and Marlow,

Plaintiffs,

vs.

HOME LAND AND CATTLE COM-
PANY, and THE NATIONAL BANK
OF COMMERCE.

Defendants.

Assignment of Errors.

Come now The Home Land and Cattle Company and the National Bank of Commerce of St. Louis, Missouri, by their solicitors and counsel, and say that in the decree of the court herein made and entered on the 14th day of December, A. D. 1900, and in the records and proceedings therein, there is manifest error in this, to wit:

I.

That the Court erred in overruling the exceptions of the defendants to the report of the master, on the ground that such exceptions had not been presented to the master, for the reason that the said exceptions were exceptions drawn and filed in the said court under and in accordance with the provisions of Equity Rule No. 83, and were exceptions to the rulings made by the master upon matters which had been fully presented to him.

II.

The Court erred in overruling defendant's exception No. 2, upon the ground that the consideration of the same would require it to review all of the evidence in the case, for the reason that the said exception was drawn under and in accordance with the provisions of Equity Rule No. 83 and specifically pointed out the particular evidence relied upon to support the exception.

III.

The Court erred in refusing to consider the defendants' exceptions Nos. 3 and 6, for the reason that the findings therein mentioned were immaterial to the consideration of this cause.

IV.

The Court erred in refusing to consider the defendants' exception No. 4, for the reason that the said exception was taken to a finding purporting to be a finding of fact, whereas the same was a conclusion of law.

V.

The Court erred in refusing to consider the defendants' exception No. 5 to finding No. 22, for the reason that the said finding reported by the master was incomplete and the Court was not bound thereby.

VI.

The Court erred in refusing to consider the defendants' exception No. 7, being exception to the conclusions of law of the master Nos. 1 and 2, for the reason that the said conclusions were not supported by the findings of fact and were against the law and the Court was not bound by the conclusions of law of the master, although no objection had been taken to them before him.

VII.

The Court erred in refusing to consider the defendants' exception No. 8, being an exception to the master's conclusion of law No. 3, and in holding that the conclusion of law as found by the master was correct, for the reason that the said conclusion of law so found by the master was immaterial to any of the issues in the said cause as made by the pleadings.

VIII.

That the Court erred in refusing to consider the defendants' exceptions to finding No. 17, and in adopting the findings of the master as therein stated, for the reason that the same was immaterial to any of the issues in the cause.

IX.

The Court erred in holding that the contract sued on was not what is termed a severable contract, for the reason that by the express terms of the contract, payment for the cattle was to be made upon the delivery thereof in trainload lots, and it does not appear from the finding that the plaintiffs refused to pay for the cattle on the ground that such delivery was not made in trainload lots, and therefore under and by virtue of the terms of the contract, payment for deliveries made became a necessary condition precedent to any further demand for deliveries.

X.

The Court erred in holding that The Home Land and Cattle Company did not demand a rescission of the contract on the ground or on account of the failure to make payment for cattle delivered, for the reason that it was not necessary that the said company should do more than demand payment for such deliveries before proceeding with other deliveries, and to refuse to make further deliveries until payment was received.

XI.

The Court erred in holding that the plaintiffs were not required to pay the amount due for the cattle delivered as found by the master, before demanding other deliveries, for the reason that by the terms of the contract the plaintiffs expressly agreed to pay for such cattle when delivered in trainload lots, and it appears from the findings of the master that trainload lots of cattle had been

delivered for which payment had not been made at the time that the defendants demanded the draft for the sum of twenty-three thousand three hundred twenty-five dollars (\$23,325.00), as set forth by the master in finding No. 11.

XII.

The Court erred in finding that The Home Land and Cattle Company was insolvent so far as the jurisdiction of Montana is concerned, and that for that reason the plaintiffs' remedy at law would be inadequate, for the reason that the master found and the Court has adopted the finding that The Home Land and Cattle Company was solvent, and the fact that such solvency did not exist in the State of Montana, was not of itself sufficient equity to give the Court jurisdiction to decree specific performance of the contract for the sale of personal property.

XIII.

That the Court erred in holding that it had jurisdiction to enforce specifically the performance of the contract in suit, and in holding and adjudging the specific performance of the said contract, for the reason that the said contract was one for the sale and delivery of goods and chattels, and there was not shown any reason why an action for damages upon the said contract would not be an adequate remedy for the breach thereof, if any breach occurred.

XIV.

That the Court erred in finding that The Home Land and Cattle Company and the National Bank of Commerce had failed to perform the said contract, so far as the same was required to be performed by them, for the reason that it appeared from the said contract and the findings of fact as reported by the master that the delivery of cattle had been made to plaintiffs for which plaintiffs had refused payment, and therefore said defendants were excused from any further performance of the said contract.

XV.

That the Court erred in adopting the findings of the master No. 11, in so far as the said finding established the balance due the defendants for the alleged shortage of cattle, and in so far as it finds that the plaintiffs tendered to the defendant the amount due under the said contract for cattle delivered, in this, that it appears from the said findings that the said shortage was based upon an estimate of twenty dollars per head for the amount of steers and spayed heifers not delivered less than 9,000, and for the reason that clause nine of the contract in suit, which provided for the payment of the sum of twenty dollars per head for each and every head less than 9,000 not delivered, was an attempt to provide stipulated damages for the breach of said contract, and was, under the laws in force in the State of Montana, where the said contract was to be performed, at the time it was to be performed, null and void, and the plaintiffs were

not entitled to any amount for steer shortage other than the difference between the market value of the cattle at the time the said contract was to be performed and the contract price as specified in the said contract.

XVI.

The Court erred in adopting the master's first conclusion of law to the effect that the plaintiffs had performed, or been ready and willing at all times to perform, all the terms and conditions of the contract in suit on their part to be performed, for the reason that it appears from finding No. 11 that the delivery of cattle, amounting to 933 head, had been made to the plaintiffs, for which payment thereof had not been made to the defendants, and the tender claimed to have been made by the plaintiffs to the defendants of the sum of nine thousand six hundred seventy-five dollars (\$9,675) was not a tender of the amount due the said defendants for the said cattle so delivered to them; nor was it a tender of the amount due the defendants after allowing for the claim of shortage under the ninth clause of the said contract, for the reason that the stipulations of the ninth clause as to the allowance of twenty dollars per head for cattle less than the nine thousand specified therein, was, under the law in force in the state of Montana, where the said contract was to be performed, at the time it was to be performed, null and void, and the only amount which the plaintiffs were entitled to deduct for said shortage, if, any, was the difference between the market value of the cattle at the time the said contract was to be performed

and the contract price as specified which, by finding No. 16, was the sum of five dollars per head.

XVII.

That the Court erred in adopting the second conclusion of law of the master, to the effect that the defendant, The Home Land and Cattle Company, had not performed the terms and conditions of the said contract upon its part to be performed, for the reason that by the master's finding of fact No. 11 it appears that the defendants were ready and willing to deliver the 457 head of stock cattle referred to in said finding upon compliance with the terms of the contract by the plaintiff, and it further appears from the said finding that the plaintiffs did not perform or tender performance of the terms of said contract to be performed by them.

XVIII.

That the Court erred in decreeing the specific performance of the contract in suit, by the delivery to the plaintiff of the 457 head of stock cattle described in the complaint, for the reason that the Court had no jurisdiction to specifically enforce the performance of a contract for the sale of personal property.

XIX.

That the Court erred in decreeing the specific performance of the contract in suit by the delivery to the plaintiffs of the 457 head of stock cattle described in said decree, for the reason that the plaintiffs have not paid or tendered to the defendants the amount to be paid for the

cattle, as in the said contract provided, nor have they performed the terms and conditions of said contract to be performed by them.

XX.

That the Court erred in entering its said decree in favor of the plaintiffs and against these defendants, and in not holding that it had no jurisdiction to specifically enforce the contract sued on, and in not ordering the said suit to be dismissed at the cost of the plaintiffs.

Wherefore, the said Home Land and Cattle Company and the National Bank of Commerce pray that the decree of the Circuit Court of the United States for the District of Montana, herein made and entered on the 14th day of December A. D. 1900, be reversed, and that the said Circuit Court of the United States for the District of Montana be ordered and directed to enter a decree dismissing the plaintiffs' bill of complaint at the costs of the plaintiffs.

CULLEN, DAY & CULLEN,

Gold Block, Helena, Montana,

Solicitors for Defendants and Appellants.

FIDELIO C. SHARP,

902-909 Union Trust Building, St. Louis, Mo.,

Of Counsel.

Filed and entered Jan. 9, 1901. Geo. W. Sproule, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

CORNELIUS J. McNAMARA and
 THOMAS A. MARLOW, Copartners
 Under the Firm Name and Style of
 McNamara and Marlow,

Plaintiffs,

vs.

HOME LAND AND CATTLE COM-
 PANY and THE NATIONAL BANK
 OF COMMERCE.

Defendants.

Petition for Order Allowing Appeal.

Come now the above-named defendants, conceiving themselves aggrieved by the decree made and entered in the above-entitled cause on the 14th day of December A. D. 1900, wherein and whereby it was ordered, adjudged, and decreed that the agreement and contract entered into between the plaintiffs and the defendant, The Home Land and Cattle Company, bearing date the 27th day of May A. D. 1897, and set forth in the bill of complaint herein, be specifically performed and fulfilled, and that the receiver heretofore appointed herein do turn over

and deliver to the plaintiffs herein 457 head of stock cattle in his possession or the proceeds thereof, and that the said defendant pay to the said plaintiffs their costs and disbursements incurred herein, taxed at five hundred forty-five and 15-100 dollars (\$545.15), do hereby petition the Court for an order allowing the defendants to prosecute an appeal from the said decree so made and entered on the 14th day of December, 1900, and from the whole thereof, to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, District of Montana, under and according to the laws of the United States in that behalf made and provided. And also that an order be made fixing the amount of security which the said defendants shall give and furnish upon such appeal. And your petitioners will ever pray.

CULLEN, DAY & CULLEN,
Gold Block, Helena, Montana,
Solicitors for Defendants.

FIDELIO C. SHARP,
902-909 Union Trust Building, St. Louis, Mo.,
Of Counsel.

Filed Jan. 9, 1901. Geo. W. Sproule, Clerk.

At a stated term, to wit, the November Term A. D. 1900, of the Circuit Court of the United States of America, Ninth Circuit in and for the District of Montana, held at the courtroom in the city of Helena, Montana, on Monday, the 9th day of January in the year of our Lord one thousand nine hundred and one. Present the Honorable HIRAM KNOWLES, United States District Judge for the District of Montana, Sitting as Circuit Judge.

CORNELIUS J. McNAMARA and
 THOMAS A. MARLOW, Copartners
 Under the Firm Name and Style of
 McNamara and Marlow,

Plaintiffs,

vs.

HOME LAND AND CATTLE COM-
 PANY and THE NATIONAL BANK
 OF COMMERCE.

Defendants.

Order Allowing Appeal and Fixing Amount of Bond.

On motion of Messrs. Cullen, Day & Cullen, solicitors for defendants, it is ordered that an appeal to the United

States Circuit Court of Appeals for the Ninth Circuit from the final decree heretofore filed and entered herein on the 14th day of December A. D. 1900, be, and the same is hereby, allowed, and that a certified transcript of record, testimony, exhibits, stipulations and all proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals.

It is further ordered that the bond on appeal be fixed at the sum of fifteen hundred dollars the same to act as a supersedeas bond and also a bond for costs and damages on appeal.

Helena, Montana.

HIRAM KNOWLES,
District Judge.

Filed and entered Jan. 9, 1901. Geo. W. Sproule,
Clerk.

*In the Circuit Court of the United States, Ninth Circuit,
District of Montana.*

CORNELIUS J. McNAMARA and
THOMAS A. MARLOW, Copartners
Under the Firm Name and Style of
McNamara and Marlow,

Plaintiffs,

vs.

HOME LAND AND CATTLE COM-
PANY and THE NATIONAL BANK
OF COMMERCE.

Defendants.

Bond on Appeal.

Know all men by these presents, that we, The Home Land and Cattle Company, a corporation, and the National Bank of Commerce, of St. Louis, Missouri, a corporation, as principals, and Henry Klein and George L. Ramsey as sureties, are held and firmly bound unto Cornelius J. McNamara and Thomas A. Marlow, copartners doing business under the firm name and style of McNamara & Marlow, in the full and just sum of fifteen hundred dollars, to be paid to the said Cornelius J. McNamara and Thomas A. Marlow, copartners doing business as McNamara & Marlow, their attorneys, executors, administrators or assigns, for which payment, well and

truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally, firmly by these presents.

Sealed with our seals and dated this 9th day of January, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a session of the Circuit Court of the United States for the District of Montana, in a suit pending in said court between the said Cornelius J. McNamara and Thomas A. Marlow, copartners as McNamara & Marlow, complainants, and The Home Land and Cattle Company, a corporation, and the National Bank of Commerce of St. Louis, Missouri, a corporation, respondents, a decree was entered against the said Home Land and Cattle Company and the said National Bank of Commerce of St. Louis, Missouri, and the said Home Land and Cattle Company and the said National Bank of Commerce of St. Louis, Missouri, having obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals to reverse the decree in the aforesaid suit, and a citation directed to the said Cornelius J. McNamara and Thomas A. Marlow, copartners as McNamara & Marlow, is about to be issued, citing and admonishing them to be and appear at the said United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco.

Now, the condition of the above obligation is such that if the said Home Land and Cattle Company and the said National Bank of Commerce of St. Louis, Missouri, shall prosecute their said appeal to effect, and shall answer

all damages and costs that may be awarded against them if they fail to make good their plea, then the above obligation is to be void; otherwise, to remain in full force and virtue.

THE HOME LAND & CATTLE COMPANY, and
THE NATIONAL BANK OF COMMERCE of
St. Louis, Missouri.

By CULLEN, DAY & CULLEN,
Their Attorneys.

HENRY KLEIN.

GEORGE L. RAMSEY.

State of Montana,)
County of Lewis & Clarke.) ss.

Henry Klein and George L. Ramsey, the sureties to the foregoing undertaking, being each first duly sworn, says, each for himself and not one for the other, that he is a resident and freeholder in the District of Montana, and is worth the amount specified in the said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

HENRY KLEIN.

GEORGE L. RAMSEY.

Subscribed and sworn to before me this 9th day of January, A. D., 1901.

R. A. FRASER,
Notary Public in and for Lewis and Clarke County, Montana.

The within undertaking on appeal is hereby approved.

Jan. 9, 1901.

HIRAM KNOWLES,

Judge.

Filed and entered Jan. 9, 1901. Geo. W. Sproule,
Clerk.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States to Cornelius J. McNamara and Thomas A. Marlow, Copartners Under the Firm Name and Style of McNamara & Marlow, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the District of Montana, wherein you are plaintiffs and The Home Land and Cattle Company, a corporation, and the National Bank of Commerce, a corporation, are defendants and appellants, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable HIRAM KNOWLES, Judge of the District Court for the District of Montana, presid-

ing in the Circuit Court, this 9th day of January A. D. 1901.

HIRAM KNOWLES,

District Judge.

Attest:

[Seal]

GEORGE W. SPROULE,

Clerk.

Service of the within citation and receipt of a copy thereof admitted this 9th day of January, A. D. 1901.

H. G. McINTIRE,

Solicitor for C. J. McNamara et al., Appellees.

Filed and entered Jan. 9, 1901. Geo W. Sproule, Clerk.

Clerk's Certificate to Transcript.

District of Montana, }
United States of America, } ss.

I, George W. Sproule, Clerk of the United States Circuit Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of five hundred and eighty-one pages, numbered consecutively from one to five hundred and eighty-one, is a true and correct transcript of the pleadings, process, orders, testimony taken, report of master, opinion, decree and all proceedings had in said

cause and of the whole thereof, as appear from the original records and files of said court in my possession; and that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the cost of the transcript of record amounts to the sum of \$183.10 and has been paid by the appellants.

In witness whereof, I have hereunto set my hand and affixed the seal of said United States Circuit Court for the District of Montana, at Helena, Montana, this 2d day of February, A. D. 1901.

[Seal]

GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 683. In the United States Circuit Court of Appeals for the Ninth Circuit. Home Land and Cattle Company (a Corporation), and The National Bank of Commerce (a Corporation), Appellants, vs. Cornelius J. McNamara and Thomas A. Marlow, Copartners Under the Firm Name and Style of McNamara and Marlow, Appellees. Transcript of Record. Appeal from the Circuit Court of the United States for the District of Montana.

Filed February 7, 1901.

F. D. MONCKTON,
Clerk.

